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ONTARIO COMMERCIAL REGISTRATION APPEAL TRIBUNAL

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Summaries of
Decisions
Volume 9
(1980)

Commercial Registration Appeal Tribunal

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COMMERCIAL REGISTRATION APPEAL TRIBUNAL

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Harry L. Singer
Cameron C. Hillmer (to Sept. 1980)
Marie Rounding Atkey (to Dec. 1980)

Registrar: Audrey Verge

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Summaries of Decisions
Volume 9 (1980)



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUMMARIES OF DECISIONS * - VOLUME 9

CITED 9 C.R.A.T.

* This volume contains summaries of, and in some instances full decisions and reasons given. If reference to the exact decision is desired application should be made to the Registrar.

Published pursuant to the Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario 1970, Chapter 113.



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

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* Reported 29 OR (2d) P. 431

CHRISTOPHER BLENOWE

APPEAL FROM PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE REGISTRATION

TRIBUNAL: MARIE ROUNDING ATKEY, VICE-CHAIRMAN as CHAIRMAN
HELEN J. MORNINGSTAR,
FRANK ROWLAND, MEMBERS

COUNSEL: PETER J. WILEY, representing Registrar
AGENT: CHRISTOPHER BLENOWE, in person

DECISION: DECEMBER 10, 1980

This hearing was held on December 9, 1980, pursuant to section 7 of The Motor Vehicle Dealers Act, R.S.O. 1970, before the Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing in the presence of the two Members who concurred, the Chairman gave an oral decision:

By notice to the Applicant dated August 1, 1980, the Registrar proposed to revoke the Applicant's registration as a salesman under The Motor Vehicle Dealers Act on the grounds mentioned in section 5(b), that is to say, the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

On September 30, 1980, the Applicant's registration as a motor vehicle salesman employed by Hoj Industries was terminated. Under Regulation 98/71 under The Motor Vehicle Dealers Act it is stated at section 13(9) that:

"Where a salesman has not applied for a transfer of registration within sixty days of termination of his employment, and where he intends to continue as a salesman, he shall apply for registration by filing an application in Form 2 together with the prescribed fee."

As of today's date, December 9, 1980, more than sixty days from the termination of the Applicant's employment have elapsed. The Registrar, Mr. Abrams, has indicated that the Applicant did not file a Form 7 application for a transfer of registration with the required employee's and employer's signature within the 60-day period.

The Tribunal therefore finds that the registration before it has already expired and that the Notice of Proposal to revoke

the Applicant's registration is no longer valid. The Tribunal therefore has no authority under section 7(4) of the Motor Vehicle Dealers Act to direct the Registrar to take any action with regard to this Proposal.

The Applicant may apply for re-registration by filing an application in Form 2 together with the prescribed fee.

GERARD F. DALEY O/A SOUTHERN AUTOMOBILES

APPEAL FROM PROPOSAL OF REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN
TO RENEW REGISTRATION

TRIBUNAL : JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR,
DON MANN, MEMBERS

COUNSEL : PETER J. WILEY, representing the Registrar
JOHN B. PIAZZA, representing the Applicant

DECISION : JULY 25, 1980

On September 3, 1976, Gerard F. Daley and Robert Done o/a Southern Automobiles (the registrant) were registered as a motor vehicle dealer under The Motor Vehicle Dealers Act. In July, 1978, in fact, and on record on the 12 of January 1979, the partnership was dissolved and Gerard F. Daley became the sole proprietor o/a Southern Automobiles. On or about the 27th of November 1979, Gerard Daley applied for a renewal of registration. The form of renewal contained the following statement:

9. (a) Has the applicant (or any partner, in the case of a partnership, or any officer or director, in the case of a corporation) been convicted under any law of any country, or state, or province thereof, of a criminal offence, or are there any proceedings now pending?..... YES ☐ NO ☒
If yes, give full particulars:

(b) Has the applicant (or any partner, in the case of a partnership, or any officer or director, in the case of a corporation) ever been convicted of an offence under any provincial statute (such as The Motor Vehicle Dealers Act, The Retail Sales Tax Act, or Section 58 of The Highway Traffic Act), or are there any proceedings now pending?..... YES ☐ NO ☒
If yes, give full particulars: _____

At the conclusion of the hearing, the Chairman gave the decision orally.

The Registrar has issued a proposal to refuse to renew the registration of Gerard F. Daley, carrying on business as Southern Automobiles, based on his opinion that the registrant is disentitled to registration and that disentitlement comes under section 5 of The Motor Vehicle Dealers Act in that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. The opinion is based on the facts relating to two convictions on a plea of guilty the 7th day of December, 1979 under section 27(1) of the Weights and Measures Act as set out in Exhibit 7 (a) and 7 (b) based on the tampering of odometers in respect of the vehicles set out therein. The Registrar further based his opinion on the answer to question 9(a) of the Application for Renewal.

The Tribunal finds that on the understanding of the Applicant, as a result of directing his own mind, and as a result of discussion with Constable Paquette of the R.C.M.P., he believed that he was answering the question correctly having interpreted the question as dealing with the specific matter set out therein. The wording of the question is such that such an answer can be forthcoming and the Applicant be technically correct. It may be that the Registrar should take the form of the question under consideration including the attempt to cover all of the industries referred to in the application.

The significant matter in this instance, of course, is the admitted fact of tampering with the odometers. The Tribunal has stated its view in respect of such action in cases which have come before it, such as the case of Thomas Wilson Reid.

There is no doubt that the continued action in the two incidents by the registrant is very much against what appears to have been his general nature as perceived by those who had dealings with him in a personal and business way. That does not excuse the seriousness of the matter.

However, the Tribunal is constrained to take cognizance of the final decision in the case of Robert Done. The Registrar has formed an opinion in the instance of the registrant based on facts very similar to those of the Done situation. The Tribunal records a finding based on the testimony before it that Robert Done gave leadership in the matter. This again does not excuse the registrant but it is a fact to which in respect to the present matter the Tribunal is giving some attention.

The Tribunal will, as I shall state in a moment, direct the Registrar to renew the registration. However, the Tribunal does record its view that tampering with the odometer is a matter of great and serious importance to the public and

the registrant must take cognizance of the Tribunal's view. The Tribunal has been impressed with the demeanor and testimony of the registrant. Mr. Wiley has pointed out that he saw that it was not a matter of how Robert Done was dealt with but how the registrant was to be dealt with at the present time. It is not an easy matter to maintain a continuing thread through related decisions on the part of either the Registrar or the Tribunal. There must be a consistency in matters.

The Registrar is hereby directed to renew the registration of the registrant with the terms and conditions attached as set out in the Robert Done decision.

ROBERT JAMES DONE
CLARK'S AUTO CENTRE

APPEAL FROM PROPOSAL OF REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO REGISTER

TRIBUNAL : JOHN YAREMKO, CHAIRMAN
HELEN J. MORNINGSTAR,
CHARLES BELISLE, MEMBERS

COUNSEL : DEIRDRE MARTIN, representing the Applicant
PETER J. WILEY, representing the Respondent

DECISION : MAY 30, 1980

The Applicant made application for registration as a motor vehicle dealer and the Registrar refused on the grounds that the Applicant was disintituled to registration under section 6 of the Act on account of past conduct.

The Applicant admitted that he was convicted on the 30th day of November, 1979, on three counts under the Weights and Measures Act and that he was fined One Hundred (\$100) Dollars for each count.

UPON the application to the Tribunal for issuance of the consent order of the Tribunal pursuant to section 4 of The Statutory Powers Procedure Act, 1971, and upon hearing counsel for the Applicant and the Registrar, and having read the consent of the parties hereto dated the 15th day of May, 1980, filed and attached hereto;

The Tribunal gave an order on consent whereby the Applicant was conditionally registered upon certain terms. These indicated inter alia the making of certain restitution to certain injured parties as well as the provision of two \$1,000 penalty bonds, one to run for two years and one for one year, to be forfeited if, in the Registrar's opinion, the Applicant should fail to act in accordance with law or with integrity and honesty or breach any other of the agreed terms and conditions, subject to the rights of the Applicant under Section 7 of The Motor Vehicle Dealers Act.

HERMAN MOTOR SALES INCORPORATED O/A SUNPARLOR MOTOR SALES
STEVEN A HERMAN

APPEAL FROM PROPOSAL OF REGISTRAR OF MOTOR VEHICLE
DEALERS AND SALESMEN
TO REVOKE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C. CHAIRMAN
MATTHEW SHEARD
MURRAY KENNEDY, MEMBERS

COUNSEL: PETER WILEY, representing the respondent
ROBERT BLAIR, representing the Applicants

DECISION: MARCH 17, 1980

This hearing was held on February 28 and 29, 1980, pursuant to section 7 of The Motor Vehicle Dealers Act, Revised Statutes of Ontario 1970.

Sunparlor Motor Sales Incorporated was registered as a motor vehicle dealer under The Motor Vehicle Dealers Act on October 18, 1973. Sunparlor Motor Sales Incorporated was changed to Herman Motor Sales Incorporated operating as Sunparlor Motor Sales on January 14, 1974, and Herman Motor Sales Incorporated (hereinafter referred to as the dealer-registrant) continues to be registered as a motor vehicle dealer at this time.

Upon the incorporation of Sunparlor Motor Sales Incorporated, Steven Herman became President, and upon its registration as a motor vehicle dealer, Steven Herman (hereinafter referred to as salesman-registrant) transferred to it as a registered salesman. He continued in those capacities with Herman Motor Sales Incorporated.

Steven Herman has been in the motor vehicle business since 1959, and has been registered as a salesman since 1965, being earlier associated with three motor vehicle dealers in which he was also a principal in varying degrees, until he decided to go on his own in 1973.

The business carried on is that of automobile (used) sales and maintenance, in Leamington.

The Tribunal finds that at all relevant times Steven Herman was an officer of the dealer-registrant and was its chief administrative and operating officer, and salesman.

By a Notice of Proposal dated the 1st day of November, 1978, the Registrar of Motor Vehicle Dealers and Salesmen, Motor Vehicle Dealers Act, served notice under section 7 upon Herman Motor Sales Incorporated and Steve A. Herman of a proposal to revoke pursuant to section 6, their respective registrations. The Notice reads in part as follows:

"PARTICULARS

..... .. As the result of an inspection assignment to Consumer Services Officer F.W. Maindonald, documentary evidence has been presented to the Registrar that reveals thirteen (13) instances where the dealer-registrant has been responsible for altering or permitting the alteration on the odometers of motor vehicles which were purchased and sold by the dealership.

The evidence reveals that the mileage on these vehicles was reduced by 302,768 miles and a total profit of \$3,775.00 was realized on the transactions.

REASONS FOR PROPOSAL

Section 5(1)(c)(i)(ii) of The Motor Vehicle Dealers Act states that an applicant is entitled to registration or renewal of registration except where:

(c) the applicant is a corporation and.

.....
(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.

The financial position of the dealer-registrant and the salesman-registrants is not being questioned, however, the past conduct of the registrants creates reasonable grounds for belief that its business has not been carried on in accordance with law and with integrity and honesty.

The evidence presented to the Registrar appears irrefutable and suggest an operation which leads to the eventual consumer purchasers of the vehicles concerned being defrauded by the practices of the registrants."

The registrants individually requested a hearing before the Commercial Registration Appeal Tribunal.

Under date of 8 November, 1979, the Registrar served upon the registrants a 'Supplementary Notice' in part as follows:

"WHEREAS:

By Notices of Proposal each of which were dated the 1st day of November 1978, (the "Proposal"), I proposed to revoke the registrations under The Motor Vehicle Dealers Act, R.S.O. 1970, c.475 as amended (the "Act") of Herman Motor Sales Inc. operating as Sunparlor Motor Sales, Steven A. Herman

I gave reasons in the Proposal for proposing to revoke the registrations and set out certain particulars in connection therewith.

.....

Certain matters have transpired which in my opinion provide further reasons for believing that the registrants are not entitled to registration under Section 5 of the Act.

TAKE NOTICE that in addition to the Reasons set out in my Proposal, I now have further reason for being of the opinion that the registrants are disentitled to registration under the Act. More particularly, I am of the opinion that events which have transpired since my Proposal provide further grounds for my opinion that the past conduct of the registrants or the officers or directors of the registrant as the case may be, affords reasonable grounds for believing that each of the registrants will not carry on business in accordance with law and with integrity and honesty.

FACTS

1. On August 7, 1979 Steve Alex Herman was found guilty of the charge that "between the 10th day of January, 1977 and the 15th day of August, 1978, both dates inclusive, in the Town of LEAMINGTON in the County of Essex and elsewhere in the Province of Ontario unlawfully did by deceit, falsehood or other fraudulent means, defraud the public of more than two hundred dollars in money by selling automobiles, the odometers on which he knew had been tampered with to conceal the actual miles the vehicle had

been driven Contrary to Section 338 Subsection (1) of THE CRIMINAL CODE".

"2. On October 3, 1979 Steven A. Herman was sentenced by way of a fine and probation order.

This Supplementary Notice forms part of my original Proposal and for the reasons stated in that Proposal and for the reasons set out in this Supplementary Notice, I am of the opinion that the registrants are not entitled to registration under the Act."

At the Tribunal hearing, pursuant to Notice given application was made to set aside the Supplementary Notice on the following grounds:

- " (a) That the Registrar is without jurisdiction to file the same;
- (b) That there is no provision in the Act for such Supplementary Notice;
- (c) That the proposal dated the 1st day of November, 1979 refers solely to Herman Motor Sales Inc. operating as Sunparlor Motor Sales, and not to Steven A Herman "

Upon consideration, the Tribunal dismissed the application and directed the Supplementary Notice to be filed and entered as an exhibit.

The Tribunal held as follows:

In the opinion of the Tribunal the Proposal consists of two parts: one is the setting-forth of the intent of the Notice, the second is the reason upon which that intent is based. A reading of the Notice of 1st November, 1978, and if necessary, the Supplementary Notice, indicates that there was notice being given that the Registrar proposed to revoke the registrations under the Act of Herman Motor Sales Incorporated carrying on business as Sunparlor Motor Sales, and of Steve A. Herman.

The reason is clearly set forth in the Notice although the language and format leave something to be desired. The giving of the Supplementary Notice by the Registrar and its acceptance and evidence with respect thereto by the Tribunal is valid in that it provides further clarification of the intent of the Notice (if necessary) and provides further particulars upon which the reason is based. The Tribunal

is of the opinion that the registrants have not been prejudiced in any way by any technical shortcomings with respect to the Notice and Supplementary Notice in that the registrants have been given complete details of the matters in respect of which they should provide for themselves a defence and position.

The Tribunal holds further:

There is no particular form of notice set out in any of the pertinent legislation.

The practice of the issuance of a Supplementary Notice is well established. It is the method by which notice of additional particulars can be given so that the registrant may prepare a reply and accordingly the rule of fairness be complied with.

On behalf of the registrants it was argued that the Registrar's decision must stand or fall on the basis of the particulars set out in the original Notice, since all the facts were then available to the Registrar and that the Registrar must be taken to have decided to proceed on the basis of those particulars.

The Tribunal finds that the Registrar is not to be so limited. The Registrar has explained that the reason the other particulars were not stated in the Notice was because he did not want to be delayed in the administrative process by virtue of an argument that it should not proceed until criminal proceedings were concluded. Particulars related to such proceedings were accordingly excluded from the Notice; this does not prevent them from being placed before the Tribunal provided that there is an awareness thereof by the registrants.

Relevant provisions of The Motor Vehicle Dealers Act and Regulations thereunder are: 5(1)(a)(b)(c),(i)(ii), 6(2), 7(1)(4) Regulation S14, 15, 16(2)(3),(g).

It is noted that in Bulletin #17 dated 10 March, 1971 from the Department of Financial and Commercial Affairs to all used car dealers it was stated:

"(4) ALTERATION OF ODOMETERS

The regulations of the new Act now require the dealer to permanently record the odometer reading at the time that a vehicle is purchased or traded in, and it also requires the dealer to show on every sales order the odometer reading at the time of sale. (This applies also, to all wholesale transactions between dealers, for any subsequent discrepancy that is discovered will be considered the responsibility of the dealer who has failed to maintain such records).

Section 19(1) of the regulations under the new Act, prohibits the alteration to the reading of any odometer, and it also prohibits the dealer from aiding or abetting any other person to make such alteration. If it becomes necessary to repair the speedometer head, the dealer must then retain the invoice showing the date of such repairs and the mileage record on the odometer at the time that the repairs were effected.

" The foregoing information represents the most important changes under the new regulations, and defines those specific areas of concern to which dealers should pay particular attention. Notwithstanding this, dealers are requested to ensure that when the new Act and its regulations are received, that they familiarize themselves with the terms and provisions of the new legislation, and ensure that these are discussed with all members of their staff. "

Regulation Section:

19(1) Subject to subsection 2, no motor vehicle dealer or salesman shall alter or permit any alteration to the odometer reading on any motor vehicle in his possession, nor shall he aid or abet any other person to make any alteration to the odometer reading of a motor vehicle that is the subject-matter of a trade. O. Reg. 99/75, s.1.

19(2) Where it is necessary for a motor vehicle dealer to exchange or to effect any repairs to the odometer of a motor vehicle, or to any other part of a motor vehicle which is directly related to the odometer, he shall record the mileage that was on the odometer prior to the exchange or repair and the mileage at the time of the sale on the sales order as well as in his permanent written records. O.Reg. 98/71, s.19(2); O. Reg. 516/71, s.1.

It is to be noted that in Bulletin #24 dated 18 February, 1975, from the Ministry of Consumer and Commercial Relations to all used car dealers, in regard to an amendment to section 19, it was stated:

" EXPLANATION

The above amendment extends the liability for the alteration of an odometer to the salesman of a dealer who shall also be deemed to have committed an offence if evidence indicates that action is warranted. This does

not in any way relieve the dealer of the same responsibility but does extend the liability to both parties.

" COMMENTS

As it is not economical to reprint the whole edition of the Act, dealers are requested to bring these amendments to the attention of their staff particularly the amendment to Section 19 relating to tampering with odometers. Dealers are also requested to retain this Bulletin in their files as this is deemed to be official notification to the industry of the aforementioned amendments. "

Frederick W. Maindonald, a Consumer Services Officer with the Ministry, testified that he attended the premises of the dealer-registrant on 14 September, 1978, to make a routine inspection. Herman was very co-operative in making available to him facilities, and records for inspection. In the course of examining some 30 sales records, he found 15 instances where the entered odometer reading was less on the document of sale by Sunparlor than on the document of purchase by Sunparlor.

He discussed the matter of one instance with Herman who explained that he had to change a broken odometer-speedometer unit. Maindonald brought out another instance, and received the same explanation with the words, "of all the deals you picked on two where there were changes". When Maindonald brought out the other instances, Herman turned red and stated words to the effect, "I didn't know this has been going on - my brother has been helping out - he must have been doing something to the odometers". When it was pointed out that his brother was not registered, Herman said, "You've got me, you've caught me. As a personal friend, how serious is it, what would you advise?".

In his testimony before the Tribunal, Herman denied saying, "You've got me - you've caught me". The Tribunal accepts the recollection of Maindonald who was very meticulous and deliberate in recalling the incident.

As a result of Maindonald's continued inspection review there emerged a total of 95 different sales with different recorded odometer entries - 82 instances formed the basis of the charge against Herman; 13 instances were set out in the Notice of Proposal of November 1, 1978.

Upon the information of Clarence Crawford, an investigator with the Ministry, Steve Alex Herman was charged that he:

" between the 10th day of January, 1977, and the 15th day of August, 1978, both dates inclusive, at the Town of LEAMINGTON in the County of Essex and elsewhere in the Province of Ontario unlawfully did by deceit, falsehood or other fraudulent means, defraud the public of more than two hundred dollars in money by selling automobiles, the odometers on which he knew had been tampered with to conceal the actual miles the vehicles had been driven contrary to Section 338 Subsection (1) OF THE CRIMINAL CODE".

Herman pleaded guilty and was fined \$10,000.00 and under a probation order agreed to pay restitution of \$8,785.00 to the purchasers of the vehicles which were the subject matter of the proceedings.

During the course of the criminal proceedings, Clarence Crawford placed before the judge a synopsis of evidence giving details obtained from records in the dealer-registrant's possession related to 82 sales of vehicles from a total of 508 during the period January 10, 1977 to August, 1978. Generally, the vehicles were purchased at the Cooksville Auto Auction from a large number of motor vehicle dealers from across southern Ontario, taken to Leamington and sold to private individuals. In each instance the odometer mileage entry on the sales record of Sunparlor Motors was considerably less than the odometer mileage entry on the purchase record. Page 1 of Exhibit 13 relating to nine vehicles shows the differences.

The difference in figures indicates a pattern close to 30,000, 20,000 miles and in some instances 10,000 and 40,000. The total reduction of the 82 vehicles was close to two million miles.

When questioned at the Tribunal hearing, Herman stated that the differences resulted from the fact that the speedometer-odometer unit had required repair and had been repaired by the installation of odometers obtained from wrecked car dealers. He stated he did not make the entries as required by section 19(2) of the Regulations because he was unaware of the requirement. The Tribunal noted that in such a large number, the difference was a substantial reduction. Herman testified that there had been effected 60-65 repairs of speedometer-odometer units; this still leaves 17 changes unexplained. The Tribunal does not accept Herman's explanation of the differences in the recorded odometer entries.

The Tribunal finds that in each of the instances listed the odometer reading was altered to make the vehicle more attractive for purchase.

The Tribunal notes that there was a regularity of sales at short intervals of such vehicles as to suggest a pattern, indeed a deliberate method in carrying on of the business - the purchase of a used car - some up-grading thereof - an alteration of the odometer - then sale.

The particulars set out in the Notice of Proposal relate to 13 vehicles sold by Sunparlor Motor Sales through the Cooksville Auto Auction and through London Auto Auction. Documentation with respect to these transactions were placed in evidence by Clarence Crawford. The documentation for each vehicle consists of two parts:

One part consists of a copy of the agreement under which Sunparlor had purchased the vehicle or taken in for a trade-in. In the instance of a purchase at the Cooksville Auto Auction the form of the Cooksville Auto Auction set forth details of the seller, details of the buyer, and description and details of the vehicle including the odometer reading.

Five of the purchases had been made at Cooksville Auto Auction; six had been made at other dealers in the vicinity of Leamington; there was one trade-in.

The other part referred to at the hearing as 'document of disposition' was an original Sunparlor purchase and sale agreement which Herman stated he filled in upon receipt of the payment cheque from Cooksville after a sale as an internal document for his accountant. The form gave details of the sale price, the description of the vehicle including an odometer reading. In no instance was an executed copy placed before the Tribunal. Herman testified that he put a figure in out of his head. He admitted that the figure was false. The Tribunal holds that the figure must prima facie be taken to be the figure on the odometer at the time of the sale. In each instance the figure in the internal document was considerably less.

All Part 2 documents were signed by S. Herman. The Tribunal notes that the variations are close to 20,000 or 30,000 miles.

The Tribunal is of the opinion that in these situations, Herman came to the conclusion after the purchase of a vehicle that it would not be profitable to put the vehicle in shape for sale in the ordinary course at Sunparlor and so put it for sale at an auto auction. The Tribunal finds that in each instance the odometer was altered to show considerably less mileage. This was done to make the vehicle more attractive for purchase by those who at auto auctions have under the circumstances thereof minimal opportunity to evaluate the condition of a vehicle.

Counsel for the registrants argued that transactions at auction sales were exempt from the requirements of the Regulations. The Tribunal does not so hold. Section 14(2) exempts "a person who conducts auctions ...". It does not exempt the vendors and purchasers required to be registered who participate; they are subject to all the requirements and provisions of the Act and Regulations. In any event the odometer reading entered by Herman must prima facie be taken to be the reading in fact.

The Tribunal finds that in respect of 13 vehicles referred to in the Notice of Proposal and in respect of 82 vehicles referred to in Exhibit 13, all subject matters of a trade, Steven Herman, an officer of the dealer-registrant and a salesman-registrant, altered or permitted the alteration to the odometer reading.

The Tribunal finds that

the past conduct of Steven Herman affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; and that the past conduct of an officer of Herman Motor Sales Incorporated, namely Steven Herman, affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.

Accordingly the Registrar is empowered to act under section 6(2) and he has given notice of his proposal to revoke.

Counsel for the registrants has submitted that Herman has already been penalized severely; further that if there is to be any additional penalty it should be a suspension.

The final issue before the Tribunal is:

what direction is to be given to the Registrar.

A cross-section of the Leamington community who had considerable dealings with Sunparlor Motors, testified on behalf of the registrants. It emerged that the business operation of Sunparlor Motors was rated very high - it was clean and business-like and in the words of a Ministry official, 'a model', and indeed each of the witnesses had praise for the 'deals' and service which had been received. The dealer did not advertise - its reputation spread by word of mouth. Attractive factors were that the prices were affixed to vehicles, and that an (unusual) full 30-day

warranty was given and honoured (even beyond the period). The witnesses, who included a competitor, a social service agency director, a retired security officer, expressed their continued confidence in Steven Herman who was described as 'fair', 'honest', and a 'real good guy'. Some had been purchasers of vehicles where odometer readings had been different, and of which they had subsequently become aware. An O.P.P. constable though expressing shock at what had occurred, stated that the action was out of character, and that he continues to trust the man.

Almost without exception the witnesses stated that they personally paid little heed to the mileage, preferring to rely on the dealer standing behind the vehicle sold.

The Tribunal is of the opinion that the odometer reading is one of the most important yardsticks in the average person's evaluation of the condition of a motor vehicle. A low mileage is generally accepted as being an important selling point. Persons who buy a used car are those who by and large cannot afford a new car; accordingly they are those who can least afford the consequences of possessing a car having less mileage 'life' than that which the odometer reading indicated. Though many of Sunparlor Motors' customers gave no heed to an odometer reading, Herman himself gave some importance to it.

The special attention given to odometer readings in the Regulations is an indication of the significance attached to them. A purchaser of a used vehicle is helpless in determining whether an odometer reading has been altered. In view of the Tribunal an odometer should be inviolate. The consumer is entitled to absolute trust in the motor vehicle dealer and salesman in this regard.

In its publicity received, and fine paid, the registrants have suffered a substantial penalty. That, and its restitution made, cannot in the opinion of the Tribunal be the end of the matter. The entitlement given by the legislation to registration is based on a high standard - the carrying on business in accordance with law and with integrity and honesty. This the registrants have failed to do, and the Tribunal is of the opinion that the failure was deliberate and extensive.

The Tribunal is of the opinion that the Divisional Court decision in The Matter of Camp Cars Limited released 10 July, 1973, is applicable. Wright, J. quoted from the Tribunal's decision directing revocation in this matter:

" The Court of Appeal of the Supreme Court of Ontario in the matter of The Registrar of Used Car Dealers and Salesmen and Robert Rowe Limited

and Robert Rowe on October 24, 1972 (summarized in /1972/ 3 O.R. 481 (Blue)) stated:

"In our view, the Statute and the regulations were passed in the interest of, and for the protection of, the public. Their enforcement, in our view, would be greatly hampered by a decision which in effect imposed a penalty of "probation" with terms, which for practical purposes have no meaning at all, in a case where very serious offences, numerous in themselves, and, it seems to us, obviously important to the public, were shown to have been committed by the dealership whose registration is under question.

Some analogy and assistance is gained from the decision of Chief Justice Robertson in Re Securities Act and Morton /1946/ O.R. 492, cited to us on this appeal, but in another connection. At p. 494, Robertson, C.J.O. said:

"The Commission is to suspend or cancel a registration where, in its opinion, such action is in the public interest: s.10. A registered broker or salesman has no vested interest that is to be weighed in the balance against the public interest. I have no doubt the Commission will, on proper occasions, give consideration to the possible serious consequences of taking away a man's livelihood, and of making the business of a broker or salesman a precarious occupation. Such considerations may have their proper place in determining what is in the public interest. It is however, the public interest that is to be served by the Commission, and not private interests or the interests of any profession or business, in the exercise of the Commission's powers of suspension or cancellation of the registration of any broker or salesman."

and from the Registrar's reasons and decision:

" The Registrar in his reasons and decision, said:

"In writing this decision, I am forced to take into consideration that the leasing company was operated by the same person who subsequently operated CAMP CARS LIMITED, and that this person, Mr. Grover Camp Robertson, had been, until this investigation revealed otherwise, a highly respected and reputable

member of the automobile retail industry, and the public had every reason to believe that the number of years that he had been in business was an indication that they could rely upon his honesty and integrity in their dealings with him, and he has, by his actions, which in my opinion are fully proven, grossly abused this trust. The public has every right to believe that persons in the automobile retail industry will deal with them in good faith, and the disclosure of the unlawful acts committed by this company over a period of more than one year, is a matter of grave concern to the Ministry that is charged with protecting the public through the supervision and control exercised through the Statute that was legislated for the public protection, and it is for this reason, and those disclosed above, that I consider that I have no alternative but to propose the revocation of the certificates of registration of CROSS-CANADA CAR LEASING LIMITED, and that of CAMP CARS LIMITED." "

His Lordship stated:

"...the Registrar and the Commercial Registration Appeal Tribunal, who are entrusted with the discretionary power, have not exercised it on any wrong principle, but have given weight to the public interest involved, and the necessity to make it patent to all, that the public will be protected, so far as their discretion permits, against agreed and consistent fraud of the kind practised here. Not only the appellants but all engaged in this business must realize that they can only do so if they act honestly and fairly."

The Tribunal hereby directs the Registrar to carry out his proposal of 1 November, 1978, to revoke the registrations of Herman Motor Sales Incorporated and Steven Herman, the registrants herein.

*Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal was dismissed by the Divisional Court. Reported 29 O.R. (2d) page 431

DONALD NEIL MacMILLAN

APPEAL FROM PROPOSAL OF REGISTRAR OF MOTOR VEHICLE
DEALERS & SALESMEN
TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
MARIE C. ROUNDING ATKEY
ROBERT J. RUMBLE, Members

COUNSEL: MICHAEL T. WADSWORTH, representing Applicant
PETER J. WILEY, representing Respondent

DECISION: SEPTEMBER 24, 1980

This hearing was held on September 4, 1980, pursuant to section 7 of The Motor Vehicle Dealers Act, Revised Statutes of Ontario 1970, before the Commercial Registration Appeal Tribunal sitting at Toronto.

The Tribunal accepts as proven the facts set out in the Respondent's Notice of Proposal.

Upon the basis of these the Tribunal finds that, having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business and also that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Tribunal ORDERS and DIRECTS the Respondent to implement the Proposal he has made and to refuse to grant registration as a motor vehicle dealer to the Applicant.

ONTARIO AUTO TRIM (TORONTO) LTD.
 MOHAMED ISSAWI
 HASSAN ISSAWI
 RIAD ISSAWI

APPEAL FROM PROPOSAL OF REGISTRAR OF
 MOTOR VEHICLE DEALERS AND SALESMEN
 TO REVOKE REGISTRATION

TRIBUNAL : JOHN YAREMKO, Q.C. CHAIRMAN
 WATSON W. EVANS, C.A.
 J. TIM HOGAN, Members

COUNSEL : JERRY S. KORMAN, representing Applicants
 PETER J. WILEY, representing Respondents

DECISION : DECEMBER 23, 1980

This was a hearing held on December 4, 1980 pursuant to Section 7 of the Motor Vehicle Dealers Act before the Commercial Registration Appeal Tribunal sitting at Toronto.

The Tribunal finds, and it is not disputed, that Riad Issawi, a director and officer of Ontario Auto Trim (Toronto) Ltd., altered the odometers of certain motor vehicles purchased and sold by Ontario Auto Trim (Toronto) Ltd. as set out in Exhibit 7, and that convictions were registered against the said Riad Issawi in respect of the alterations as set out in Exhibit 13. It is noted for the record that Riad Issawi is no longer registered as a salesman under the Act.

The business of Ontario Auto Trim is carried on in a modest fashion, in a small but open space, by three brothers who are associated as officers and directors of the corporation and who work intimately together, with some division of responsibility in the overall operations. Mohamed Issawi is an automotive expert and had the responsibility for the purchase of the vehicles. Hassan Issawi was involved in the improving of condition of motor vehicles, including those the subject of the purchases and sales. Mohamed and Hassan played a part in the sale of vehicles with Mohamed playing a direct and active role, participating in the sale of one of the vehicles in respect of which an odometer was tampered with.

The Tribunal is of the opinion, on the evidence before it, that at the least Mohamed and Hassan ought to have known what was happening to the vehicles. They acted irresponsibly when they took no interest in the factor which is an integral and important part in the sale of used vehicles to laymen, that is of the condition of the odometers. Further, although some

action was taken subsequent to the conviction of Riad Issawi in respect to the reorganization and restructuring of the corporate registrant, the continuance of Riad Issawi as a shareholder and active participant in the total operation of Ontario Auto Trim (Toronto) Ltd., was inexcusable.

Accordingly, the Tribunal finds that each would be disentitled to registration under section 5 of the Act. In the case of Ontario Auto Trim (Toronto) Ltd., the corporate registrant, the past conduct of its officers or directors, mainly Riad Issawi, who was the main actor and the one who had the general responsibility for the conduct of the business operations of Ontario Auto Trim (Toronto) Ltd., affords reasonable grounds for the belief that the business of Ontario Auto Trim (Toronto) Ltd., will not be carried on in accordance with law, integrity and honesty.

The Tribunal is also of the opinion that in the case of Mohamed Issawi and Hassan Issawi, their conduct affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty, in the event that they were applying for registration.

The question before the Tribunal is as to the action to be taken by the Registrar under the circumstances of this particular case. The Tribunal is of the opinion that the conduct, with respect to the corporate registrant, of its officers and in particular Riad Issawi was such, that there should be a revocation of the registration. In respect of Mohamed Issawi and Hassan Issawi, under the circumstances, and based on the evidence placed before the Tribunal, where there is some reasonable doubt in respect of direct participation and direct knowledge, the Tribunal is of the opinion that a suspension should take place.

Accordingly, the Tribunal, by virtue of the authority vested in it under the Motor Vehicle Dealers Act, directs the Registrar to carry out his proposal to revoke the registration of Ontario Auto Trim (Toronto) Ltd., to refrain from carrying out his proposal to revoke the registration of Mohamed Issawi and Hassan Issawi, and to suspend the registration of Mohamed Issawi and Hassan Issawi for a period of three months.

At the conclusion of the hearing, the Chairman orally gave the decision and reasons therefore in the presence of the two Members who concurred.

THOMAS WILSON REID

APPEAL FROM PROPOSAL OF REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO RENEW REGISTRATION

TRIBUNAL : JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR,
CHARLES BELISLE, MEMBERS

COUNSEL : PETER J. WILEY, representing the Registrar
THOMAS WILSON REID, in person

DECISION : APRIL 28, 1980

Applicant was originally registered as a salesman under The Motor Vehicle Dealers Act on March 6, 1972 to Myers Chev-Olds-Cadillac Ltd. and continued so until August 4, 1978. He transferred to Ottawa Car Sales on August 17, 1978 and is still so registered. On the 11th of December, 1979 he applied for a renewal of registration.

On the 21st day of February, 1980, the Registrar issued a document as a notice of proposal to revoke the registration of Thomas Wilson Reid. With regard to the form of the notice as a technical document the Tribunal will treat the document as a refusal of renewal of registration. The basis is the same, in that the Registrar is of the opinion that the registrant is disentitled to a registration under section 6 of the Act. The Tribunal is of the opinion that the Applicant for renewal, the registrant Thomas Wilson Reid, has in no way been prejudiced by the form of the notice. The particular basis is that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty which is one of the grounds set out in section 5. If so found there will be dis-entitlement for registration.

The particulars of the opinion is based on three convictions in respect of which certificates have been filed as 6(a), (b), and (c), in regard to three vehicles.

The applicant did not dispute the facts of the convictions before the Tribunal.

The Tribunal reiterates its position stated in the past that tampering with the odometer of a vehicle is a very

serious matter and that if performed is a very serious fraud upon the individual member of the public. It is harmful to the purchaser of the vehicle, and indeed is harmful to the industry as a whole, and its comprehension by the public. Members of the public often have to rely on trust and confidence in the member of the industry with whom they are dealing. That confidence and trust is reinforced to individual members of the public, by reliance accepted generally on the state of the odometer. There is no doubt that that reliance in the minds of the public is so great that they relate it to the worth and value of the vehicle being purchased. Tampering with the odometer is something which requires expertise and so far as a member of the public is concerned, there is really no expertise on his own part that he can rely upon for protection. It is such a serious matter that it has been dealt with in three statutes in order that the public may be assured that relevant authorities have taken steps by way of passage of laws for their protection. Tampering of an odometer requires deliberate thought and a deliberate action. The Tribunal finds that such has been the case in the situation here.

In respect to the Applicant, the Tribunal finds that initially there did not appear to be a sense of responsibility demonstrated on his part by way of acknowledgement to the investigating officer that a wrong had been committed, and no indication early in the matter that there was a sense of regret on his part.

With respect to the application filed for a renewal, the answer in the negative on the 11th of December, 1979, with respect to conviction is not considered by this Tribunal as a deliberate falsification. It is considered an act either of carelessness or of being less than forthright on the part of the Applicant who should have comprehended at that time that his relationship with the Registrar was such as to call for a complete revelation of what had occurred. Even though in this instance the Registrar would have been informed, one can foresee circumstances in the course of every day events, where the Registrar might have overlooked the matter.

The Tribunal notes for the record that the Applicant did take the witness stand and was very forthright in all of his replies to the questions. Some questions were very direct and answers given by him would affect him negatively.

Counsel for the Registrar has made reference to section 21 of the Motor Vehicle Dealers Act. It may be that at some time in the future when opinion with respect to the Applicant can be changed by virtue of circumstances as they

exist at that time, the Registrar will see fit to take note of the Tribunal's assessment.

On application of the Registrar, the Registrar is hereby ordered to carry out his proposal by way of action to refuse to renew registration on the basis of disqualification related to section 5 in that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

WENMORE FINANCIAL SERVICES LIMITED

APPEAL FROM PROPOSAL OF REGISTRAR
UNDER THE MORTGAGE BROKERS ACT
TO REFUSE TO RENEW REGISTRATION

TRIBUNAL : JOHN YAREMKO, Q.C. CHAIRMAN
MATTHEW SHEARD, VICE CHAIRMAN
ERIC EXTON, MEMBER

COUNSEL : BRIAN BUCKNALL, representing the Applicant
PETER J. WILEY, representing the Registrar

DECISION : AUGUST 7, 1980

Wenmore Financial Services Limited had been registered as a mortgage broker under The Mortgage Brokers Act since March 15, 1975. Neil Walter, has at all material times been President and Director of Wenmore. On June 18, 1979, Wenmore applied for renewal of its registration as a mortgage broker and the Registrar of Mortgage Brokers proposed to refuse to renew its registration.

The Registrar of Mortgage Brokers proposed to refuse to renew registration upon two general grounds, viz:

1. having regard to the financial position of Wenmore, and also the financial position of Neil Walter, Wenmore cannot reasonably be expected to be financially responsible in the conduct of its business;
2. the past conduct of Neil Walter affords reasonable grounds for belief that Wenmore's business will not be carried on in accordance with law and integrity and honesty.

Wenmore, in putting forward its financial position, has relied on the financial support of Mr. & Mrs. Walter directly and indirectly, and has included as an important asset certain advances to Raistaf Holdings Incorporated of which Mr. & Mrs. Walter are the shareholders. The Tribunal is of the opinion, and really it was not disputed, that the sum total of the financial positions of all, inclusive of Mr. & Mrs. Walter and of Raistaf, were relevant to the determination of Wenmore's specific financial position.

As of today there is the direct obligation of Wenmore to Robert Callow in respect of which there is a claim of \$12,000. Even if there is a settlement for less, the amount, in the light of the total picture, of the claim is substantial and significant. As yet it has not been attended to. It is noted that a settlement is in process; it is noted that a considerable amount of time has elapsed in regard to this claim. Secondly, there is the considerable obligation of Neil Walter in respect of Writs of Execution. Thirdly, there is the considerable obligation of Raistaf in respect of Writs of Execution issued by Canadian Imperial Bank of Commerce, even though ameliorated by virtue of an agreement. Fourthly, there is also the incipient obligation of Mr. & Mrs. Walter personally in respect of the claims, which are the subject matter of these Writs.

An analysis of the financial statements of the past three years of Wenmore indicate there is not such a development of assets of Wenmore as to point to any strengthening in its financial position. This is so even though there has been a change in direction in the operation from a major expanding one to a single man, (i.e. Neil Walter) operation.

The key element of the financial position of Wenmore is the asset claimed in advances to Raistaf. The Tribunal was concerned about this item at the close of the earlier session of the hearing and that concern has not been allayed. No third party valuations have been proffered to the Tribunal in respect of the real assets of Raistaf. The Tribunal is of the opinion that the general real estate and market conditions and the quality of the real estate holdings are such as to call into question any major valuation of the properties. However, the telling point is that there are extant Writs of Execution against Raistaf that cast great doubt as to the inclusion of its obligation to Wenmore as being supportive of any positive financial position of Wenmore. This new element which has arisen since the previous session of the Tribunal is of great significance as the Tribunal takes up where it had let off.

In summary there is therefore

1. the direct financial weakness of Wenmore by virtue of its obligations
2. the financial weakness of its chief officer and manager and
3. the doubt as to the financial worth of Wenmore because of the doubt as to the worth of its major asset.

The Tribunal finds therefore that having regard to the financial position of Wenmore, it cannot be reasonably expected to be financially responsible in the conduct of its business.

The other issue arises as to what direction should be given to the Registrar:

1. Is the direction to be to refuse to renew? or
2. Is the direction to be to renew subject to terms and conditions.

The parties have, upon the suggestion of the Tribunal, considered terms and conditions and generally agreed subject to one exception - a \$50,000 bond requirement. The Tribunal notes that in this respect the Registrar has changed his position and now is of the opinion that under all the circumstances that registration should not be renewed. The Applicant has been unsuccessful in respect of obtaining a bond and the Tribunal is of the opinion that under the circumstances as exist in reality no such bond can be obtained. The reason is, of course, the very issue which is before the Tribunal - the negative financial position of the Applicant. This term is crucial to any terms and conditions being imposed. Were the Tribunal to direct the Registrar to renew without the condition of the bond, the Tribunal is of the opinion that such a course would not be proper. Further, in the light of circumstances the Tribunal is of the opinion that to impose such a condition would be a futile exercise.

Weighing the considerations to be given by the Registrar and by the Tribunal, the Tribunal is of the opinion that the primary consideration is the protection of the public. The Tribunal is of the opinion that the incipient danger to the public by virtue of the registrant continuing to carry on business is too great. The Registrar has a tremendous obligation in this regard. The public places great reliance on the registration process of regulated industries, and must assume that there is no weakness on the part of the registrant if the process has been adhered to. The Tribunal expresses the opinion that the Registrar can take into consideration the situation of an industry in assessing the potential of the significance of the financial position of the registrant.

The Tribunal makes no comment with respect to past conduct so far as it relates to integrity and honesty; its only comment is that the actions of the registrant stemming from actions of the chief officer of the registrant, and therefore the registrant, in regard to its obligations, indicate dealings with the public and in particular, with Callow and Mr. & Mrs. Van Gerven, which show a lack of consideration of the public when financial pressures are on.

The Tribunal finds that the registrant-applicant for renewal comes within the exception set forth in section 5 (1) (c) paragraph i - having regard to its financial position it cannot reasonably be expected to be financially responsible in the conduct of its business, and the Tribunal directs the Registrar to carry out his proposal to refuse to renew the registration of the applicant.

BEVERLEY COTE

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT, 1976
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
CAMERON C. HILLMER
LOUIS A. RICE, MEMBERS

COUNSEL: ISAAC SINGER, representing Applicant
BRIAN M. CAMPBELL, representing Corporation

DECISION: JULY 8, 1980

This was a hearing held on June 19, 1980, pursuant to Section 16 of The Ontario New Home Warranties Plan Act, 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

The Claimant, Beverley Cote, as purchaser, entered into an Agreement of Purchase and Sale with Marlborough Terrace, as vendor, to purchase a condominium unit (Unit No. 51, Level 1) at the vendor's development at 2261 Yeats Court, Oakville, Ontario. The effective date of the Agreement was May 3, 1977. The total purchase price was to have been \$73,995.00 made up as to \$50,399 by a First Mortgage, as to \$16,695. by a Second Mortgage, with a deposit of \$500. delivered with the offer and a balance of \$6,900 to be due on closing subject to adjustments. An Interim Occupancy Agreement marked "Schedule A" to the Agreement and forming part thereof, specified a monthly rent or occupancy charge of \$500. per month which would be payable if the purchaser went into occupation of the premises prior to the completion of the conveyance in her favour and further that the balance due on closing, but without adjustments, would be payable at that time.

The vendor (builder), Marlborough Terrace, was a partnership of two Ontario corporations, 315810 Ontario Limited and Briar Lane Investments Inc., whose presidents, respectively, were one, Sam Lazarof and one, Nicholas Diguseppe. The sole purpose of this partnership appears to have been the construction of the condominium project in question.

Upon hearing the testimony given at this hearing and upon perusing the documents which were entered into evidence, the Tribunal finds the following facts:

The Claimant, Mrs. Cote, paid a total amount of \$6,099.64 against the purchase price of the unit by way of "deposit" within

the meaning of Section 6, By-law 4, of the Regulations to the Ontario New Home Warranties Plan Act ("the Act").

Mrs. Coté went into occupancy and possession of her unit on or about June 19, 1977, which was about two to three weeks subsequent to the original date fixed for closing in the Agreement of Purchase and Sale. Her occupancy was to be "interim occupancy", as provided for by the terms of the Interim Occupancy Agreement referred to, since the Vendor was unable to provide title on the agreed date. The Claimant had good and sufficient reason to move into the unit prior to closing and was justified in expecting, as she did, to receive a conveyance to complete the purchase within a reasonably short time. In addition to delivering her cheque for the balance due on closing, she delivered post-dated cheques to cover rent at the rate stipulated in the Interim Occupancy Agreement (\$500 per month) and two of these (June and July) were paid.

The Claimant went into occupancy with the knowledge, consent and approval of the vendor, whose interests, as appeared from the testimony of its solicitor, were best served by as many of the units being occupied as possible prior to the registration of the condominium plan. (This may possibly have been in order to demonstrate to the public and to prospective purchasers of the remaining unsold units that the units were habitable.)

Unfortunately this turned out to be scarcely the case. As the Claimant set about the business of inhabiting the premises certain defects came to her notice which made this difficult. For example, the washstand for the master bedroom was not equipped with a sink. The master bedroom window was not equipped with a piece of glass. The closet, whose doors were missing, had shelves but after a short time these curled up. This closet needed to be painted, and, after the Claimant had made repeated requests, the vendor sent men into the premises while the Claimant and her household were out and they attended to this. In so doing they did not, however, first remove the clothes which were hanging in this closet, and so these clothes also were painted. There was a shower in the bathroom, but when it was turned on the water did not come out through the shower nozzle in the usual way. The pipes had not been connected and so when the taps were turned on the water gushed into the interior of the walls of the condominium unit, coming out, eventually, in quite the wrong places altogether. The roof leaked. Buckets and towels were placed on the stairs and on the floors and landings throughout the unit. The drywall became so wet one could poke one's finger through it. When the lamps were turned on sparks came out. Then one day the ceiling in the family room just fell down. A coffee table which happened to be in the room at the time received the impact and was smashed. At about the same time a friend's car, parked in the drive-way, was also smashed by falling masonry necessitating, it was said, repairs

to it to the value of \$3,000. The staircase moved 2 inches out from the wall.

At this point in time the Claimant became very dissatisfied. She instructed her bank to stop payment on the post-dated cheque she had lodged with the vendor to cover rent for August. Quite soon after that Mr. Ben Freedman, who was the Secretary of 315810 Ontario Limited, attended on the premises. Mrs. Cote was not there but Mr. John Ruggiunti, her fiance, was. Mr. Freedman looked around and saw the condition the place was in. Mr. Ruggiunti further says Freedman didn't give him any arguments. He said he personally wouldn't pay \$500. a month for such a place either and that the terrible defects in the premises would be repaired and set to rights forthwith and that the Claimant's carpet and drapes, which had been more or less ruined, would be cleaned. Upon this undertaking of Freedman he and Mr. Ruggiunti shook hands and the former departed. Subsequently a little work was done but not much. As stated above, The Tribunal accepts this testimony as true.

For nine months Mrs. Cote remained in occupation. She paid no further rent and eventually, at the end of that time, refused to accept a conveyance of title - the closing having been theretofore repeatedly postponed by the vendor - and moved out, taking with her the stove and other appliances, the property of the vendor, to the value of \$1,500.

The Tribunal further finds as a fact, and in accordance with her testimony, that Mrs. Cote did not move out earlier simply because she had \$6,099.64 tied up in the unit, a substantial sum which she could not afford to abandon. The Tribunal accepts her testimony that she asked the vendor to accommodate her in a hotel or other temporary premises and her dogs in a kennel while making the repairs necessary to render the quarters habitable and that the vendor refused this request. As well, the Tribunal finds that Mrs. Cote became so grossly dissatisfied with the attitude displayed by the vendor and with the really dreadful condition of the subject premises over the whole of the period of her occupancy that a strong antipathy towards the condominium unit developed in her mind such that she felt she could never be happy living there and was filled with one consuming desire, namely to cut her losses as well as she could and get out. She did not want to suffer a large loss on top of all the other misery and contumely she had endured but was willing to sustain some measure of loss if only she could attain what grew to be her principal aspiration - just to get out of the subject premises and to end a situation which had turned into a nightmare.

Mr. William Halman, a member of the Ontario Bar and who was the solicitor acting for the vendor at all material times, gave evidence that the vendor was aware of what he described as

a design defect in respect to the roof which led some of the units to suffer water damage and that the Claimant's unit was one such "problem unit". His instructions, moreover, were to waive the rent, if necessary, in order to induce the Claimant to accept title and assume ownership which, coincidentally, would result in the vendor's receiving the final advance of the First Mortgage in an amount of about \$10,000 which it desired. He also testified that his client, as a matter of principle and of policy did not consider it prudent to agree to "concessions" before closing to purchasers in possession. (This was in reply to a question concerning the promises made by Mr. Freedman to render the premises habitable not having been kept). Mr. Halman impressed the Tribunal as a transparently honest witness and conveyed to the Tribunal the clear impression that his clients or principals were straightforward businessmen interested only in the success in their joint venture and in whose scheme of things the feelings of the Claimant or any notion of fair play towards her had neither relevance nor existence. He also plainly conveyed to the Tribunal that the vendors knew the subject premises were defective, if inhabitable at all, and were quite willing to vary the interim rent figure or to waive it entirely if either obliged or induced to do so. Mr. Halman made it clear that the vendor was well aware that the \$500 figure was quite entirely excessive for the premises occupied by the Claimant.

On the evidence of the witness Halman, who was called by the Respondent, and supported without contradiction by both witnesses for the Claimant, the Tribunal accedes to the proposal advanced by counsel for the Claimant and finds that the rental figure specified in the Interim Occupancy Agreement was, in fact, too high an amount by reason of the premises having been, in fact, at all material times, almost, but not quite, unfit for habitation and, further, that the Claimant was literally obliged to remain in occupation because of the large sum of her capital she had tied up in the property by virtue of the deposit she had paid which she felt, upon some reasonable grounds, she would be abandoning forever were she to vacate.

Section 14 (1) (a) of the Act reads, in part, "Where a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the ... vendor's failure to perform the contract... (she) is entitled to be paid out of the guarantee fund the amount of such damage (up to the amount set by Section 6 of by-law 4, i.e. in this case \$6,099.64)". Section 14 (2) further provides that "In assessing damages the corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source".

The Tribunal finds that the vendor contracted to convey to the Claimant certain residential premises, a condominium unit, which was to be finished more or less in accordance with the "model suite" displayed and inspected but at all events something which was fit for habitation and altogether superior to what was eventually provided to the Claimant. The Tribunal finds that the vendor was unable to provide title on the date specified in the contract; that the vendor was unable then or at any time, or at least at any reasonable time, to provide a finished unit such as was contemplated by the contract as the subject thereof and was for these and other reasons in breach of its contract with the Claimant within the meaning of Section 14 (1)(a) of the Act; and the Tribunal further finds that the Claimant, as purchaser, was well justified in refusing to accept the miserable premises which the vendor was allegedly eventually in a position to convey to her, that she was obliged to move or at least well justified in her decision to move to alternative accommodation and indeed sustained the financial loss of her deposit paid as well as other sums laid out and expenses, with the result that, apart from the provisions of Section 14(2), she would have not only an action for the recession of the Agreement of Purchase and Sale but also an action in damages against the vendor and be entitled to be paid the amount of such damages out of the compensation fund.

However, Section 14(2) provides, as aforesaid, that "in assessing (such) damages the corporation shall take into consideration any benefit (etc)...to the person from any source". In the recent Valiallah decision it was held by the Tribunal that such a benefit would subsist in the value of the unpaid back rent as provided for by an Interim Occupancy Agreement, almost identical to that found in the present case, and that decision was quite properly cited by learned counsel for the Respondent.

In the instant case, however, learned counsel for the Claimant has, in our opinion, succeeded in drawing a distinction between the facts of the two cases whereby the precedent-setting decision may be distinguished in his client's favour. This distinction, we find, lies in the fact that the value or applicability of the interim occupancy rent was never disputed in the Valiallah case. The value of the rent-free accommodation, no matter how calculated, was never suggested or argued to have been less than the deposit paid. But in the present case the deposit was \$6,099.64. The unpaid rent, even at the \$500 figure established by the terms of the contract, was only \$4,500 in aggregate for the nine month period. When this sum is supplemented by the sum of \$1,500, agreed by all parties as the fair value of the purloined appliances, a balance of \$99.64 is still owing to the Claimant.

But the essence of the Claimant's argument in this case is that the \$500 figure is improper as being too high a rental figure for what the Claimant actually got.

The Tribunal, no doubt as was the Corporation in its earlier turn, is loathe to become involved in the perilous and inexact business of assessing value, or damages, especially in cases where such assessment or liquidation has already, superficially, been done - in this case, on the face of the contract. In this case, however, the Tribunal finds itself obliged to decide this point which has been raised because it is critical to the Claimant's case. With admitted trepidation the Tribunal notes the words "in assessing damages" as well as the words "...shall take into consideration..." and concludes that this terminology is the language by which the Legislature has imposed the responsibility and the duty upon the Corporation to exercise an element of discretion. It now falls upon this Tribunal, in the exercise of its administrative function, to direct the Corporation concerning the performance of that duty.

In a case where the value of a "benefit", within the meaning of Section 14(2) is clearly in dispute, and where straightforward evidence has been adduced that the real value of such "benefit" may be other than the apparent or superficial value thereof as may appear from a contract between the parties or otherwise, then the Tribunal finds the Corporation, and this Tribunal in reviewing a decision of the Corporation, must vary that value and reassess it in accordance with reality.

The Tribunal finds that the true value of the accommodation provided during the nine month period over which no rent was paid lies somewhere between the figure of \$500 stipulated in the Interim Occupancy Agreement and the sum of \$50 per month which Mr. Ruggiunti (semi-seriously, we think) said it was worth. The Tribunal fixes the fair value of the accommodation at \$150 monthly or \$1,350 for the entire nine month period and directs the Corporation to assess it accordingly.

The Tribunal allows the Claimant's claim for the refund of her deposit, which has been found to have been in the amount of \$6,099.64 and directs that the sum of \$1,350 to cover back rent owing, plus the sum of \$1,500 to cover the value of the purloined appliances, be deducted from this. It directs the Corporation to pay her the balance out of the compensation fund in the amount of \$3,249.64.

M. E. ETHIER CONSTRUCTION LIMITED

APPEAL FROM PROPOSAL OF REGISTRAR UNDER
ONTARIO NEW HOME WARRANTIES PLAN ACT, 1976
TO REVOKE REGISTRATION

TRIBUNAL : JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD, VICE-CHAIRMAN
LOUIS RICE, MEMBER

COUNSEL : BRIAN M. CAMPBELL, representing Respondent
AGENTS : ARTHUR GREEN,
MARCEL ETHIER, for Applicant

DECISION : FEBRUARY 15, 1980

The applicant had requested a hearing after receiving a Notice of Proposal dated June 21, 1979 under Section 9 of the Act from the Respondent to revoke its registration under the Plan for the reasons listed on the back of the Notice of Proposal. The Tribunal's decision was given orally.

This hearing was held on November 20, 1979, and February 6, 1980, pursuant to Section 9 of The Ontario New Home Warranties Plan Act, 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

A septic system failed to operate satisfactorily and upon refusal by the Applicant to do so the Program had to take remedial steps.

Pursuant to an agreement dated the 25th of July, 1977, Leonard Le Clair and Sandra Le Clair purchased from the Applicant a home to be constructed. The purchasers took possession in October of 1977. In April and in July of 1978 the purchasers advised the Applicant of problems with the septic system. On September 26, 1978, the purchasers by letter, complained to the Applicant that a consultant "found that (the) system contained clay" and recommended "that the entire area be removed and replaced with sandy loam with a new bed installed". The Program was concurrently advised.

On November 23rd, 1978, the Director of Environmental Hygiene in a letter to Mr. Le Clair advised that sewage was ponding on the ground surface above the tile bed of the sewage disposal system and that to correct this situation it would be necessary for the heavier soil to be removed and replaced with

a sand loam soil. A new tile bed should then be installed in the new material.

In subsequent correspondence it emerged that the Applicant:

"Does not assume responsibility for the problem in connection with the tile bed due to the fact that the tile bed was installed on the instructions of the Leeds and Grenville Health Unit, and the soil used for the installation was previously approved by an official of the Health Unit before the installation of the bed was completed."

The Applicant took the position that "... any problem existing in connection with the tile bed is not the responsibility of (the Applicant) as it was acting at all times under the instructions of the Health Unit". The matter culminated between the Applicant and the Corporation. In a letter dated May 30th, 1979, the Corporation advised the Applicant:

"If no satisfactory repairs of the system are commenced by June 6, 1979 we will have no alternative but to employ other forces to finalize this work at your firm's expense. Upon completion of this work by others the cost will be forwarded to you for payment. This payment must be made within seven calendar days upon receipt of the invoice.

The failure of your firm to comply with the above, will jeopardize your continued registration as an Ontario builder".

The Applicant failed to commence remedial work and in accordance with one of two tenders received by Mr. Le Clair the Program engaged on June 6th, O. E. MacDougall to do the remedial work which was the removal of the original material in the bed, its replacement with sandy loam, and the installation of some new weeping tile. Upon completion of the work in July, 1978, the Program paid the cost (agreed to for the purpose of this hearing in the amount of \$1,720.00). No reimbursement by the Applicant has been made.

If the sole ground of contention by the Applicant was that as referred to in the correspondence and herein, the matter would have been decided by this Tribunal on the basis of an earlier decision. In a similar situation the roles of Health Unit and its inspection were dealt with: (In Re Ernest L.

Harper Limited - released 14 November 1979.) The Tribunal found that the responsibility vis-a-vis the purchaser of the home in respect of necessary repairs belonged to the builder.

This instant case differs from in Re Harper in that during the Tribunal hearing of November 20th there was placed into evidence and argument made on behalf of the Applicant that the faulty septic operation was due to the fault of the owners, in that it was alleged that a substantial garden tractor and a bulldozer were brought upon the septic system at the behest of the owners. When testimony in this regard, some hearsay, was placed before the Tribunal, the Tribunal adjourned the proceedings in order to hear further testimony in this regard.

The testimony placed before the Tribunal today indicates clearly the presence of a tractor and the presence of a bulldozer on the property of the dwelling. Presence is not disputed. What has emerged as a dispute is the location of the tractor and bulldozer in respect of the entire septic system. It was alleged in earlier testimony that the tractor and the bulldozer were directly on the site of the septic system. Evidence today, however, indicates that the use, and position of these two vehicles, though at the site of the septic system, were not on the septic system. This is a vital distinction for it has been brought out in testimony that a wheeled tractor, or a bulldozer on the site would likely have caused the kind of damage which would have brought about a faulty operation of the septic system. This conclusion would conform with the letter of Mr. Armstrong in which he used the phrase "in part". The testimony of Mr. Le Clair respecting the use of his garden tractor in working the ground surrounding the septic tank system has been accepted by the Tribunal. There is no doubt that at one point in his actions on the tractor Mr. Le Clair came very close to the system - to the degree that the front wheels of the tractor became mired at the edge of the septic system where leakage and seepage had occurred. The Tribunal accepts Mr. Le Clair's testimony that he did not take the tractor on top of the septic tank system. Indeed it accepts the fact that Mr. Le Clair was probably incapable of doing so even had he wanted to do so.

The Tribunal accepts the explanation that although basically the kind of soil used would lock in water in certain areas, where there is sand there would have been seepage or leakage. The Tribunal finds there is really no conflict with such occurring and testimony respecting the impermeability of the soil in general.

The Tribunal finds that Mr. Clow did put soil on top of the edge of the septic system in the course of his adding to the berm but that the same was not of such a degree as to disturb the septic system so as to make it in any way inoperative. In making these findings the Tribunal casts no doubt on the credibility of any witnesses. At no time does it appear that the septic system was specifically inspected as to the exact location of the tractor or the bulldozer. That some testimony is in conflict with other testimony and the Tribunal's finding is not to be taken that someone testified as to facts which were not believed to be the case. There is no doubt that the human eye sometimes tends to see what it wishes to see under the circumstances, and especially when it is done in recollection after a lengthy period of time. For example, the testimony of a witness as to his view of the mired tractor from the road is not the kind of a view upon which one could scientifically base the location of the tractor in respect of the tile system.

The Tribunal accordingly finds that under the circumstance the inoperation of the septic system was due to the nature of the soil used in the installation. For that the Applicant, vis-a-vis the purchaser for whose protection the Program was devised, is the person to whom the purchaser must look for remedy. In so finding the Tribunal wishes to make it clear that it is not making a finding of any negligence on the part of the Applicant who appears to have acted in good faith throughout. The Tribunal gives its decision as follows: the Registrar by this order is directed to carry out the proposal to revoke the Applicant's registration under the Plan unless before the 15th day of March, 1980, the Applicant shall have reimbursed the Corporation the sum of \$1,720.00.

349652 ONTARIO LIMITED

APPEAL FROM PROPOSAL OF REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT
Excalibur Homes
REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
WATSON W. EVANS, C.A.
JOHN CORSI, Members

COUNSEL: BRIAN M. CAMPBELL, representing the Registrar
AGENT: ARTHUR WATSON, representing the Registrant

DECISION: APRIL 17, 1980

The Applicant had requested a hearing after receiving a Notice of Proposal dated December 3, 1979 under Section 9 of the Act from the Respondent to revoke its registration under the Plan.

This hearing was held on April 9, 1980, pursuant to section 9 of The Ontario New Home Warranties Plan Act, 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

The issue between the parties was the failure of the Appellant to rectify defects and deficiencies in accordance with a conciliation decision rendered by the Program and dated June 8, 1979. The Appellant had been advised of a complaint in respect of defects and deficiencies by the owner of a new home warranted under the Act. The Appellant was subsequently put on notice by the Warranty Program and, subsequent to the conciliation decision, had been advised to rectify in accordance with that decision. He was warned that the Warranty Program would effect repairs through its own subcontractors in the event of his failure to comply. The Warranty Program subsequently called for tenders and assigned the repair work to a contractor who completed the work and billed the new home owner who was reimbursed by the Warranty Program in the amount of \$4,180.00.

The Tribunal found on the evidence that the Warranty Program made truly reasonable efforts to advise the Applicant of its position under law, that the Warranty Program's letters to the Applicant were both received and ignored. The Tribunal found that the steps taken by the Warranty Program to remedy the problem complained of were reasonable and were justified in the circumstances and that the sum of \$4,180 paid to its subcontractor was reasonably and properly expended. The Tribunal found that the Warranty Program was justified in looking to the Applicant for repayment to the Plan of this sum.

In its decision delivered orally the Tribunal directed the Registrar to carry out his proposal to revoke the Applicant's registration under the Plan unless the said sum of \$4,180 was repaid by the Applicant to the Warranty Program on or before April 30, 1980.

A GARISTO

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
HELEN J. MORNINGSTAR,
STEPHEN PUSTIL, Members

COUNSEL: BRIAN M. CAMPBELL, representing Corporation
AGENT: ALDO GARISTO, representing Applicant

DECISION: NOVEMBER 27, 1980

This hearing was held on November 27, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing in the presence of the two Members who concurred, the Chairman gave an oral decision:

In essence, this matter, which has been described as a claim against the Compensation Fund established under the Ontario New Home Warranties Plan Act is not that at all. In point of fact it is an appeal from a Conciliation Report and therefore the provisions of section 17(4) of the Act apply. The Tribunal is bound by its earlier decision in the matter of Gracien St. Onge reported at 8 CRAT (1979) p.81.

The Tribunal lacks jurisdiction and orders accordingly.

B. GARISTO

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT, 1976

REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR,
STEPHEN PUSTIL, Members

COUNSEL : BRIAN M. CAMPBELL, representing Corporation
AGENT : ALDO GARISTO, representing Applicant

DECISION: NOVEMBER 27, 1980

This hearing was held on November 27, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing in the presence of the two Members who concurred, the Chairman gave an oral decision:

In essence, this matter which has been described as a claim against the Compensation Fund established under the Ontario New Home Warranties Plan Act is not that at all. In point of fact it is an appeal from a Conciliation Report and therefore the provisions of section 17(4) of the Act apply. The Tribunal is bound by its earlier decision in the matter of Gracien St Onge reported at 8 CRAT (1979) p. 81.

The Tribunal lacks jurisdiction and orders accordingly.

GARY GODFREY

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
HELEN J. MORNINGSTAR,
REGINALD C. MARTIN, MEMBERS

COUNSEL: BRIAN M. CAMPBELL, representing Corporation
AGENT: GARY GODFREY in person

DECISION: JULY 16, 1980

This hearing was held on July 16, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, Chapter 52, before the Commercial Registration Appeal Tribunal sitting at Toronto.

The Claimant, a maintenance millwright, took possession of the subject premises July 22, 1977 at which time a crack on the front porch was evident and the builder promised to repair it as well as a crack near the basement window which developed shortly after the taking of possession. Such repairs were made but proved inadequate as the cracks re-opened. Several subsequent complaints were made to the builder but no complaint was made to the Warranty Program until 1980 by which time the warranty extended only to major structural defects as defined under the Act.

The Claimant supported his testimony with certain photographs of these cracks taken from outside. He stated that the cracks in the porch could be seen from the ceiling of the fruit cellar but when questioned by the Tribunal stated that there was no water seepage from either crack into the interior. The Tribunal pointed out to the Claimant that additional proof would be required in order to prove the existence of a major structural defect at which point the Claimant withdrew from the hearing.

The Tribunal did not require assistance from the Respondent and dismissed the claim. The decision of the Warranty Program was upheld.

MELVIN AND MARCY GREENGLASS

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT, 1976

REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
HARRY L. SINGER
STEPHEN PUSTIL, C.A. MEMBERS

COUNSEL: BRIAN M. CAMPBELL, representing Corporation
AGENT: MELVIN GREENGLASS, in person and as agent for
Marcy Greenglass

DECISION: NOVEMBER 24, 1980

This hearing was held on November 21, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before the Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing in the presence of the two Members, who concurred, the Chairman gave an oral decision:

The Tribunal orders and directs as follows:

- 1) That the Warranty Program arrange for an independent party, fully experienced and competent in the construction field, to inspect the subject premises forthwith and to report to the Warranty Program as to the cause of the problem and the proper remedy;
- 2) That such report be delivered to the builder, Baroque Construction, and that the repairs or other appropriate work in compliance with such report be undertaken within 14 days of the delivery of the same to the builder and be completed by the builder within 30 days;
- 3) If such work is not commenced within 14 days as aforesaid and completed within 30 days as aforesaid by Baroque or if such work is done and proves unsatisfactory within one year of its completion, then the Warranty Program is ordered to have it done by an independent contractor at the expense of the Warranty Program to be recovered by it from the builder Baroque.

GREENLEAF INVESTMENTS INCORPORATED

APPEAL FROM PROPOSAL OF REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT
PROPOSAL TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN, as CHAIRMAN
CAMERON C. HILLMER
STEPHEN PUSTIL, C.A., Members

COUNSEL: ALAN S. PRICE representing the Applicant
BRIAN M. CAMPBELL representing the Respondent

DECISION: MAY 1, 1980

The Applicant had requested a hearing after receiving a Notice of Proposal from the Respondent dated 14th November, 1979 under section 9 of the Act, to revoke its registration.

This hearing was held on April 17, 1980, pursuant to section 9 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before the Commercial Registration Appeal Tribunal sitting at Toronto.

Certain complaints had been made which the Applicant had been unable or unwilling to rectify in respect to a new home warranted under the Act.

The Tribunal gave its decision orally:

Minutes of Settlement having been tabled by Counsel for both parties, the Tribunal orders that terms of the settlement be implemented as follows:

1. Greenleaf, the Applicant herein, agrees to retain independent plumbing and drainage contractors to effect complete repairs to the toilet and bathtub in the sub-basement of 99 Manitou Crescent, Bramalea, within 45 days from the date hereof. The work will be guaranteed by Greenleaf for a period of one year after the date of repair.
2. In the event the contractors experience difficulties in effecting the repairs, Greenleaf will report forthwith to Hudac New Home Warranty Program.
3. Greenleaf will forthwith remit to Hudac New Home Warranty Program the sum of \$160.
4. Upon completion of the repairs referred to aforesaid, Mr. M. Virgilio will remit to Hudac New Home Warranty Program the sum of \$1,675.

5. Upon satisfactory completion of the said repairs, the proposal filed by Hudac New Home Warranty Program will be withdrawn.
6. The hearing before The Commercial Registration Appeal Tribunal will be adjourned for 45 days but will be brought back on for hearing if the said repairs are not effected.

MR. & MRS. G.L. HARMEN

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT,
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN, as CHAIRMAN
CAMERON C. HILLMER,
JOHN C. HURLBURT, Members

COUNSEL: BRIAN M. CAMPBELL, representing Corporation
MR. & MRS. G.L. HARMEN, in person

DECISION: MAY 22, 1980

This hearing was held on May 13, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

The Decision was given orally as follows:

The Tribunal found that the Applicants had failed to bring their complaint to the attention of the Warranty Program within the one year period which would have given them the benefit of the much wider warranty. It felt that this was the result of inadvertence and sympathized with them.

The Tribunal was pleased by the willingness of the Warranty Program to perform the three items of repair which were referred to by counsel, namely to effect repairs to the joists beneath the water closet, to properly secure the joist or trimmer at the end of the furnace vent, and also to install joist hangers in the basement. The five year warranty against "major" structural defects might well have applied to these.

While not in a position to make a direct order to the Applicants, but the Tribunal wished to very strongly recommend to the Applicants that they secure the opinion of a professional engineer, possibly the municipality's engineer, in respect to the fireplace and to the possible hazard there. It urged the Applicants to do this at the earliest possible date. It reminded the Applicants that they had over three years remaining during which they might bring a further claim if, for example, in the opinion of a professional engineer, a major structural defect actually existed. The Applicants failed to establish that at the instant hearing but another application could be brought and succeed if the evidence were sufficiently strong.

W. CHARLES AND ELIZABETH H. HARRISON

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
HELEN J. MORNINGSTAR and
ALBERT LONGO, MEMBERS

COUNSEL: BRIAN M. CAMPBELL, representing Respondent
W. CHARLES and ELIZABETH H. HARRISON, in person

DECISION: OCTOBER 17, 1980

This was a hearing held on September 25, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing, the Chairman gave an oral decision.

"We are unable to allow this claim in that there is no adequately strong evidence, or any, that a major structural defect, as defined at By-Law R-1 Part 1, section 1(m) of The New Home Warranties Plan Act, 1976, exists and the claim therefore must fail."

HASAM INVESTMENTS LIMITED

APPEAL FROM PROPOSAL OF REGISTRATION
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN
ACT, 1976

REFUSAL TO RENEW REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
CAMERON C. HILLMER
STEPHEN PUSTIL, C.A., Members

COUNSEL: HARVEY FREEDMAN, representing the Applicant
BRIAN M. CAMPBELL representing the Respondent

DECISION: MAY 22, 1980

This hearing was held on April 17, 1980, pursuant to Section 9 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, sitting at Toronto.

The Applicant had requested a hearing after receiving a Notice of Proposal from the Respondent dated December 5, 1979, under Section 9 of the Act, refusing to renew its registration under the Plan for the following reasons:

Having regard to your financial position you cannot reasonably be expected to be financially responsible in the conduct of your undertakings as required by paragraph 7(1)(a) of the Act, more particularly as follows:

Financial statement shows deficit of \$327,812.00

Failure to respond to request for guarantee dated September 27, 1979.

Failure to respond to letter dated October 16, 1979.

Failure to respond to letter dated October 31, 1979.

Prior to the hearing, the Applicant filed with the Registrar of the Tribunal a Summary of Reasons for Requesting a Hearing, as follows:

1. The Registrar erred in reaching the conclusion that based on the Financial Statements of the Applicant indicating a deficit of \$327,812.00 that its financial position was such, that it could not reasonably be expected to be financially responsible in the conduct of its undertakings as required by Section 7(i)(a) of the Act.

2. The Registrar erred in finding that failure to respond to his request for a guarantee or to respond to the Registrar's letters dated October 16th, 1979 and October 31st, 1979 constituted reasonable grounds upon which to support his finding of financial irresponsibility aforesaid.
3. The Registrar erred in properly interpreting the Financial Statement of the Applicant and failed to give effect to the fair market value of the Applicant's Assets.
4. Having regard to the Applicant's inventory of homes, present and future, the Registrar failed to exercise his reasonable discretion in refusing to renew the Applicant's registration under the Plan.

The Tribunal, having carefully reviewed the evidence adduced and upon hearing counsel for both sides, offers the following comments upon the Applicant's Reasons for Requesting a Hearing:-

1. The financial statements of the Applicant, which were over a year out of date and which indicated a deficit of \$327,812, were not satisfactory and gave rise to well-founded doubt as to the financial responsibility of the Applicant.
2. In light of these financial statements, the Registrar's request for personal guarantees from the principal shareholders of the Applicant was fully reasonable. The refusal of the Applicant to provide these or to reply to correspondence relating to that request was not reasonable.
3. The Registrar did not err by not giving effect to the "fair market value" of the Applicant's assets in the interpretation of the financial statements of the Applicant. The Registrar was in fact acting in accordance with the decision of the Tribunal in the 1978 case of Falconhurst Construction (Oakville) Limited (7 C.R.A.T. p. 26) which was applied by the Tribunal in the 1979 case of Castle-Hill Properties (8 C.R.A.T. p. 26). In the latter decision the Tribunal stated that such a figure was "theoretical" and that "land is worth only what a purchaser is willing to pay at the time of selling."
4. The Applicant's present inventory of homes, upon the evidence, is nil. The Applicant's registration for the year now past, viz, for the year ending August 15, 1979, was conditional upon the Applicant's construction program for that year being limited to one detached house only and the same limitation appears in the

application for renewal of registration made by the Applicant on July 30th, 1979. The Tribunal finds that the Registrar's refusal to grant that application was reasonable in the circumstances in evidence but considers a construction program of one house only to be a modest one which ought not to be deemed unreasonable were the Applicant Corporation able and willing to secure and furnish to the Registrar the personal guarantees of its principal shareholders, as requested, accompanied by duly authenticated net worth statements of such shareholders.

The Tribunal therefore Orders and Directs the Registrar to carry out his proposal and to refuse to renew the Applicant's registration under the Plan unless, within thirty days of the date of this Order, the Applicant shall have furnished him with the personal guarantees of the Applicant's principal shareholders together with duly authenticated statements of their net worth.

TOMAS C. LUBOS

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
CAMERON HILLMER,
JOHN C. HURLBURT, P. Eng., Members

COUNSEL: TOMAS C. LUBOS, in person
BRIAN M. CAMPBELL, representing Respondent

DECISION: MAY 1, 1980

This hearing was held on April 15, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

The Decision was given orally as follows:

This application on the evidence must fail as the Applicant has failed to prove the existence of a major structural defect as defined by its Act and its Regulations.

ARCHIE MACMILLAN
GLORIA MACMILLAN

APPEAL FROM DECISION OF THE CORPORATION DESIGNATED
TO ADMINISTER THE ONTARIO NEW HOME WARRANTIES PLAN
ACT

REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
CAMERON C. HILLMER
JOHN CORSI, MEMBERS

COUNSEL: BRIAN M. CAMPBELL, representing Corporation
COLIN E. WRIGHT, representing Applicants

DECISION: JUNE 12, 1980

This hearing was held on June 5, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before the Commercial Registration Appeal Tribunal sitting at Toronto.

The Decision was given orally as follows:

The Tribunal finds the claim in respect to broken window and the grading and re-filling of the trenches must fail by reason of having been brought beyond the time limit specified in the Act and its Regulations. The Tribunal is bound to adhere to these provisions very strictly. Claims must be in writing and they must be brought within the one-year period.

The claim in respect to sodding we allow in the amount of \$400 which is what the Warranty Program have already allowed. We feel that the Warranty Program's reasons for limiting its allowance to this sum, which are on record, are valid.

Respecting the question of the brick or aluminum siding, the claimants contracted for a brick home and they received a home which was clad in aluminum. The Tribunal feels that there was a financial loss. We do not feel that they need to wait until some future time when the property has been placed on the market and actually sold for that loss to be realized.

The Tribunal does not accept the argument that the claimants, having accepted the aluminum siding when brick was not available, thereby waived any right to compensation for a loss. The Tribunal finds that the claimants acted by reason of necessity when they accepted the aluminum siding at the time they did. At that time, this house was only partially completed and the walls, as they stood at that time, were made of chip-board. This would have been extremely susceptible to damage

from the elements. Something had to be done and something had to be done rapidly. Therefore the claimants acted out of necessity. That does not wipe out their entitlement to some compensation for a loss which was sustained.

The Tribunal does not accept the assessment of \$2,000 set out in Exhibit 5, being the letter from Keyes Real Estate and Insurance Ltd., as a definitive measure of the quantum of loss. It accepts this letter only to the extent that it demonstrates that brick siding is of greater value than aluminum siding. The Tribunal estimates the loss somewhere between that figure and the figure which would have been worked out had it extended the Warranty Program's estimate and has come to the round figure of \$1,000. This sum should be added to the amount already offered by the Program in its letter of January 24, 1980, making a total award of \$4,823.33 to be paid to the claimants in return, of course, for a full release.

EDWARD A. MACRAE AND ROSEMARY MACRAE

APPEAL FROM DECISION OF THE CORPORATION DESIGNATED
TO ADMINISTER THE ONTARIO NEW HOME WARRANTIES PLAN
ACT
REFUSAL OF CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR
LOUIS RICE, Members

COUNSEL: BRIAN M. CAMPBELL, representing Respondent
EDWARD A. MACRAE, in person and as agent for
ROSEMARY MACRAE

DECISION: DECEMBER 18, 1980

This was a hearing held on November 10, 1980 pursuant to section 16 of the Ontario New Home Warranties Plan Act, 1976 Statutes of Ontario 1976 before the Commercial Registration Appeal Tribunal sitting at Toronto.

The applicant's claim is for the sum of \$2,350.00, which sum is equivalent to the deposits paid in respect of a purchase of Unit 26, Level 1 (College Green) from Abode Two Limited.

The claim was held invalid on behalf of Hudac New Home Warranty Program as set out in a letter dated the 24th of January, 1980

"Perusal of the Interim Occupancy Agreement and the Statement of Occupancy indicates that rental payments in the amount of \$305.00 was due on a monthly basis. The period of occupancy is shown to be approximately twenty-two months, however, rent has been paid for only 1 1/2 months, although we do not have a copy of this cheque on the file leaving 20 1/2 outstanding. By comparing the deposit paid of \$2,350.00 with the rent outstanding of \$6,710.00, it is clear that your client, that is the applicant, has suffered no financial loss due to the Vendor's breach of contract and therefore no payment will be made out of the Guarantee Fund."

The Tribunal finds as follows. There were occupancy fees of \$305.00 per month unpaid by the applicant for fourteen months totalling \$4,220.00. There was rent of \$345.00 per month unpaid by the applicant to C.H.M.C. for six months totalling \$2,070.00.

Although in the formal claim the applicant claimed in respect of the sum of \$2,350.00, in his presentation, he stated that he had suffered a loss (in an amount which was not specified) by virtue of the fact that having entered into the purchase, the subject matter of this hearing, which was not completed, he had been prevented from entering into some other home purchase which in retrospect would have been to his advantage by reason of the change of circumstances in the current real estate market and interest rates.

Although the matter is not germane to the amount of the formal claim, the Tribunal expresses its opinion that such cannot be the basis of a financial loss to be considered under the Act, under the circumstances of this particular case.

The applicant has also stated that he had made certain expenditures in respect of the accommodation which would result in a loss if he were to vacate the same. Again, although it is not related to the amount of the formal claim, the Tribunal is of the opinion, as it has held in the similar case of O. Valiallah that under the circumstances of this particular case, such cannot be the basis of a loss under claim under the Act.

The Program's position was that the claim for \$2,350.00 was offset by a benefit which comes under Section 14 of the Act which reads:

"In assessing damages the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source"

and the Corporation claimed that the two sums referred to, which are related to the total set out in the letter of January 24th, are benefits to the applicant.

The Tribunal is not making a ruling in respect of the validity of the position put forward by the Program in respect of the rental due to C.H.M.C. However, it is to be noted that the sum owing for occupancy fees totalled \$4,220.00, which sum is in excess of the deposits paid of \$2,350.00 and accordingly, by virtue of the offset of the benefit to the applicant, there is no financial loss within the terms of the Act.

In this instance, the Tribunal is following its own precedent as set out in the matter of O. Valiallah, (decision released on the 6th of June, 1980).

The Tribunal directs the Corporation not to pay the claim.

HARRY LEROY MARCENKO
DOREEN MARY MARCENKO

APPEAL FROM DECISION OF THE CORPORATION DESIGNATED
TO ADMINISTER ONTARIO NEW HOME WARRANTIES PLAN ACT
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
CAMERON C. HILLMER
JOHN HURLBURT, P. Eng., Members

COUNSEL: HARRY LEROY, AND DOREEN MARY MARCENKO, in person
BRIAN CAMPBELL, representing Respondent

DECISION: MARCH 4, 1980

This hearing was held on February 5, 1980, pursuant to Section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

The Claimants had contracted with Abode Two Limited to purchase a condominium unit at 401 Bowes Road, Concord, Ontario, but the transaction, after at least one postponement, never closed due to the Vendor-Builder's inability to make title when the Claimants tendered.

The Claimants had taken possession of and occupied the subject premises on or about the date fixed for the original closing and, in hopes of an eventual closing, remained in occupation of the flat for about five months. An occupation fee, or occupation rent, had been fixed (at a rate of \$348.00 per month) by an Interim Occupancy Agreement annexed to the Agreement of Purchase and Sale and expressed to be an amendment thereto. By the terms of such interim occupancy agreement the occupancy rent or fee was not to be credited as part payment of the purchase price. At the hearing the Claimants did not dispute that an amount of \$1,685.80 (calculated at the aforesaid rate over the actual period of their occupancy) was owing by the Claimants to the Vendor and agreed that this should be set off against their claim against the Vendor. When the Vendor failed to settle their claim or otherwise reply to their demands for payment, the Claimants approached the Warranty Program for compensation pursuant to Section 14 of the Act out of the Guarantee Fund.

The Warranty Program agreed that part of the Claimants' claim against the Fund was a proper one, to wit, the sum of \$500.00 which had been referred to in the original Agreement of Purchase and Sale as "the deposit". Additionally, the Warranty Program claimed the benefit, by way of set-off, of the amount the

Claimants acknowledged they owed the Vendor on account of occupancy rent (\$1,685.80). However, the Warranty Program disputed that the balance of the Claimants' claim, being a sum of \$1,650.00, was a proper claim against the Fund.

This last-mentioned figure arises from an instrument in writing dated April 25th, 1978, duly executed by the parties to the Agreement of Purchase and Sale and, in the view of the Tribunal, forming part thereof through incorporation by reference, and entered as an Exhibit and reads as follows:

"RE: Abode Two Limited
Sale to Harry & Doreen Marcenko
Unit No. 57
College Green, Brampton

IT IS UNDERSTOOD AND AGREED that the Purchasers in the above-mentioned Agreement of Purchase and Sale will be allowed a credit of \$1,650.00 --One Thousand Six Hundred and Fifty ----Dollars on the Final Statement of Adjustments on closing of the above transaction.

DATED at Toronto this 25th day of April 1978."

Annexed to and forming part of the original Agreement of Purchase and Sale is a schedule, marked "Schedule D" which provides, inter alia, that "broadloom throughout all areas other than tiled or basement areas" is to be included in the purchase price. However, it appears (from the testimony of the male Claimant) that either concurrently or within one or two days after the execution of the original Agreement of Purchase and Sale the parties agreed that the Claimants would arrange, at their own expense, to select and have installed the necessary broadloom carpeting, thereby relieving the Vendor of the responsibility and expense of supplying and installing the same as provided in the contract. The purpose of the instrument in writing dated April 25, 1978, which is set out above and entered as an exhibit, was to establish a credit in favour of the Claimants in the sum of \$1,650.00 to cover this. Evidence in the form of testimony by the male Claimant and corroborated by a bill from Eaton's Ltd., was submitted that the Claimants eventually and in point of fact laid out a considerably greater sum, viz., \$1,951.69, to have this broadloom carpeting installed in the subject premises.

The Warranty Program, while agreeing to the validity of the claim against the Fund of the \$500.00 referred to in the original Agreement of Purchase and Sale as "the deposit", and also to the setting-off, to the benefit of the Fund, of the sum of \$1,685.80 to cover the occupancy rent owing by the

Claimants to the Vendor, objected to the inclusion of the \$1,650.00 carpet money in the claim because they took the position that it was not a "deposit" within the meaning of By-Law R-3, section 1 (j) contained in the Regulations under the Act, which reads as follows:

- "(j) "deposits" means, in respect of a home, all moneys received before the date of possession by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement, and, in the case of a condominium dwelling unit, includes moneys received by or on behalf of the vendor after the date of possession and prior to the date of transfer but does not include moneys,
- (i) paid under the purchase agreement as rent or as an occupancy charge and not part of the purchase price, or
 - (ii) specified in the purchase agreement not to be credited against the payment of the purchase price pursuant to the provisions of subsection 6 of section 24a of The Condominium Act."

By-Law R-4, section 6 (1) reads:

"A purchaser who does not become an owner and who has a claim under clause a of subsection 1 of section 14 of the Act in respect of a purchase agreement is entitled to be paid out of the guarantee fund, for all damages claimed against the vendor for financial loss, an amount equal to all deposits owing by the vendor to the purchaser under the purchase agreement to a maximum of \$20,000.00. "

The portion of section 14 referred immediately above reads:

"(1) Where,
a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.... within four years after the warranty expires, or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations. "

The Tribunal finds, on the evidence, that the carpeting in question was purchased and installed by the Claimants in reliance upon the understanding that they would be duly credited for their outlay in the final adjustments of this transaction of purchase and sale. It finds, again on the evidence, that the carpet was cut up to conform to the peculiar and particular shape of the rooms and halls of the subject condominium apartment, and laid down upon and securely fastened to the floors thereof. The Tribunal finds that the labour involved in the cost of this cutting and fastening-down forms a substantial part of the amount paid out by the Claimants and would not have been recoverable even if the carpet could have been taken up and removed for re-sale or re-use. The scraps salvaged from such an operation (only at the expense of further and additional outlays, it may be noted) would, in the view of the Tribunal, have a greatly diminished value, if any, even in the event that the Claimants had been in a position to remove them. Therefore the Tribunal, having made the findings stated above, also finds that the Claimants had fully divested themselves of the sum they laid out for the carpet beyond any reasonable opportunity of recovering the same in whole or in part.

The question now to be determined is whether the said outlay, made in performance of the Agreement of April 25, 1978, entered into evidence as "Exhibit 5", made in the circumstances as found, may be called a "deposit" within the meaning of the Act and its Regulations so as to permit the claim against the Guarantee Fund to succeed.

In attempting to interpret a section in this or any case the Tribunal feels itself bound by the principles of natural justice and of fair play and equity. In cases where members of the public have entered into a relationship with the Warranty Program and come before the Tribunal seeking relief, having established to the satisfaction of the Tribunal that their conduct has been in all ways bona fide, reasonable, open and honest, and whose difficulties in no way stem from any negligence, dishonesty, greed or misconduct on their own part, but rather from the adverse development of circumstances over which they have had no reasonable or foreseeable opportunity to avoid, this Tribunal does not believe that such members of the public should be penalized or have their difficulties rendered more onerous by

reason of a harsh application of the principles of interpretation, inappropriate to the circumstances of the case from the standpoint of equity. In this case the Tribunal finds that the sum of \$1,650.00 passed from the Claimants in part performance of their obligation to pay monies to the Vendor. Such monies passed in advance of the closing date and to that extent were advance payment or "deposit" in the sense that word is customarily employed in ordinary commercial usage.

The Tribunal finds that it was made "on account of the purchase price payable under the Purchase Agreement", as provided in section 1(j) of By-Law R3, (viz., under the Agreement of Purchase and Sale into which the Tribunal finds the agreement of April 25, 1978, was incorporated by reference).

Section 1(j) of By-Law R3 states that "deposits" "includes moneys received by or on behalf of the vendor ...". (The word "includes" may or may not exhaustively limit the applicability of the word "deposits" to the circumstances or conditions described by the words which immediately follow the word "includes".) The Tribunal finds that in this case when the carpeting in question was bought by the Claimants in fulfillment of their agreement with the Vendor a monetary benefit in the amount of \$1,650.00 passed to the Vendor and that the said sum was "received" (when it was received by the payee to whom such payment was made) "to the benefit of the vendor", therefore fulfilling the requirements of the interpretation section which was cited.

The Tribunal further notes, again studying the said section 1(j), that "deposits" specifically does not include "moneys, (i) paid under the purchase agreement as rent or as an occupancy charge...". In this case the Claimants have agreed to the set-off of the rent or occupancy charge against "deposits", but, in the absence of such a voluntary agreement by the Claimants, the Tribunal questions, in passing, if such set-off would be appropriate since the two types of sum are not, by specific terms of the statutory regulations, sui generis.

The Tribunal allows the Claimants' claim as presented at the hearing and directs the Registrar to pay them the sum of \$666.80.

*Note: Decision appealed to the Supreme Court of Ontario.
The decision was upheld.

416043 ONTARIO LIMITED

APPEAL FROM PROPOSAL OF REGISTRAR UNDER NEW HOME
WARRANTIES PLAN ACT
Mar-Lin Construction
TO REFUSE TO ISSUE

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
MARIE C. ROUNDING ATKEY,
JOHN CORSI, Members

COUNSEL: W.G. POOLMAN, representing Applicant
BRIAN M. CAMPBELL, representing Respondent

DECISION: OCTOBER 27, 1980

This hearing was held on October 21, 1980, pursuant to section 9 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before the Commercial Registration Appeal Tribunal sitting at Toronto.

The Chairman gave an oral decision:

The Proposal of the Registrar to refuse this application for registration under the Ontario New Home Warranties Plan Act was based on two grounds, as shown in the Proposal. These were first in respect to the Applicant's financial position and secondly in respect to the Applicant's technical competence.

The first ground might have been settled to the Registrar's satisfaction had the Applicant been willing to supply a bond or letter of credit as suggested. But the real reason for refusal to register lay in the second ground set out in the Proposal. That had to do with technical competence.

The officers of the Applicant Corporation were a builder, whose registration under the Act was already under suspension, and his wife. Neither of these persons was deemed suitable to be in operational control of a business registered under The Act. The latter appeared to possess considerable skill and experience in what might be called the business or verbal side of the construction industry but the Tribunal did not receive the impression that she was a competent construction technician.

"We cannot conclude that the necessary technical competence as required by section 7(1)(d) of the Act is likely to be provided by her. This is not to preclude her from so demonstrating on another occasion, later on."

ORDERED that the Registrar's decision be upheld.

MOWE CONSTRUCTION LTD.

APPEAL FROM PROPOSAL OF REGISTRAR UNDER
ONTARIO NEW HOME WARRANTIES PLAN ACT, 1976
PROPOSAL TO REVOKE REGISTRATION

TRIBUNAL : MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR,
LOUIS RICE, MEMBERS

COUNSEL : ROBERT MURRAY, representing the Applicant
BRIAN M. CAMPBELL, representing the Respondent

DECISION : FEBRUARY 20, 1980

The Applicant had requested a hearing after receiving a Notice of Proposal dated October 30, 1979 under Section 9 of the Act from the Respondent to revoke its registration under the Plan for the reasons listed on the back of the Notice of Proposal.

This hearing was held on January 28, 1980, pursuant to Section 9 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, Chapter 52 before The Commercial Registration Appeal Tribunal sitting at Toronto.

The Applicant had constructed a house in Sarnia and had sold it to a Mrs. Lymburner who thereupon became the owner. The owner was very dissatisfied with the house and made numerous complaints which eventually resulted in a Conciliation Inspection and a Conciliation Decision being made under Section 17 of the Act.

The Conciliation Decision provided that a number of deficiencies should be repaired or rectified and the Warranty Program, by means of a letter in writing, notified and instructed the Applicant to get this work started within 14 days upon pain of losing or jeopardizing its registration. The letter also told the Applicant "should you decide not to abide by this notice, we will have no alternative but to employ other forces to finalize this work at your firm's expense".

Three weeks later Mrs. Lymburner telephoned the Warranty Program's Regional Office at Kitchener and in effect, appears to have told them that while the Applicant's representative had attended on the premises and gone through certain motions little or nothing had been done by way of implementing the Conciliation Decision as directed by the Warranty Program's letter.

The Regional Manager at Kitchener then sent the Applicant a stern letter by registered mail reading in part as follows:

"On May 7, you ...were notified to commence work within 14 calendar days and complete as soon as possible in a diligent and workmanlike manner.

On this date, the Owner, Mrs. Lymburner, informed us that you have made very little attempt to comply with our instructions to you. It appears that you are not overly concerned about honouring your WARRANTY on this home.

TAKE NOTICE that you now have until Friday, June 15, 1979 to have all this work substantially COMPLETED. Should you fail to meet this deadline the Warranty Program will take whatever action is necessary to have the work completed with any costs involved invoiced to you.

You will receive no further instructions regarding this matter. I trust you will act accordingly as your Registration may be in jeopardy."

When this registered letter was not answered (in writing) within the time limited, the Program wrote the Lymburners and instructed them to obtain three quotes from builders of their choice and undertaking to pay in accordance with such quote as the Program might then accept. The quotes were obtained in short order and one of them, couched in very, very broad and imprecise terms as to the actual amount of money involved was accepted by the Program in a letter which contained the following words:

"...It is understood that until the work is actually in progress it would be most difficult for you to quote a firm price. In good faith (we) have agreed to let you do the job on a time and material basis..."

What the Program did not know was that the necessary remedial work had, at that time, already been almost completed by the Applicant.

The Tribunal's decision concluded as follows:

It is regrettable to note that copies of the above letter (accepting the quotation tendered by a contractor selected

by the owner) were sent to Mr. Johnson at the Program's head office in Toronto as well as the Lymburners but not sent to Mr. Mowe, the party who was presumably going to be ultimately responsible for payment under penalty of losing his registration upon which, in turn, depended his livelihood. Such a copy might have made the Solinas repairs unnecessary.

The Tribunal finds that the Warranty Program Officials ought not to have authorized this remedial work without having checked to make certain it had not been done by Mowe.

The Tribunal finds no reason to reject the testimony and other evidence submitted by the Applicant. However, we find the Applicant remiss in failing to reply to the June 7 registered letter from the Warranty Program, even though the Applicant testified that he had complied with the work ordered in the letter and saw no reason to report this in writing.

Builders who are registered under the Warranty Program may be properly expected to co-operate with those who are administering it.

The Respondent did not see fit to call to the stand either Mrs. Lymburner or Mr. Klauss whose evidence might have been of assistance to the Tribunal in making its decision. The Tribunal realizes that the Warranty Program had the handicap of a personnel change at a critical time but we are obliged to accept the Applicant's evidence that Mowe had substantially complied with the Conciliation Decision before the tenders were requested by the Warranty Program. It follows that the extra work done was mistakenly undertaken, and that the Program cannot look to the Applicant for reimbursement nor can the Respondent, at this time, properly implement his Proposal herein to cancel the Applicant's registration.

The Tribunal therefore directs that the Respondent's proposal to revoke the Applicant's registration be withdrawn

In the view of the Tribunal, the method by which quotes are accepted by The Warranty Program is not a prudent way of selecting a contractor to carry out repair work. The quote (tendered by the contractors selected) is only a wild guess and should never have been seriously considered. All contracts should be for fixed prices and under no circumstances be "cost plus". The letter to (the contractors chosen) from the Regional Manager of the Kitchener office offers (the chosen

contractors) carte blanche to charge as they see fit to carry on the repair work. There is great doubt that some of this work was ever done...

PAUL ELLIOTT BUILDING AND CONSTRUCTION LIMITED

APPEAL FROM PROPOSAL OF REGISTRAR UNDER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT
REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
WATSON W. EVANS, C.A.
JOHN CORSI, Members

COUNSEL: BRIAN CAMPBELL, representing respondent

DECISION: MAY 1, 1980

The Applicant had requested a hearing after receiving a Notice of Proposal dated November 14, 1979 under Section 9 of the Act from the Respondent to revoke its registration for the reasons listed on the back of the Notice of Proposal.

This hearing was held on April 9, 1980, pursuant to Section 9 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before the Commercial Registration Appeal Tribunal sitting at Toronto.

The Decision was given orally as follows:

The Tribunal finds, on the evidence, that there has been a breach of warranty within the meaning of section 8, sub-section 2 of the Ontario New Home Warranties Plan Act, specifically in respect of the residence of N. Noblett, R.R. #4, Acton, Ontario. The Tribunal further finds that the provisions of conciliation decision dated February 19, 1979, were not complied with, in that five of the items in respect of which it was incumbent on the Applicant to effect repairs, were ignored. The Applicant is found to have been remiss in having failed to answer the letters directed to him by the Warranty Program or to attend a meeting arranged by the Warranty Program or to attend this hearing in order to make submissions in its defence.

The Tribunal directs the Registrar to carry out the proposal to revoke the Applicant's registration under the Plan.

PEEL CONDOMINIUM CORPORATION NO. 146

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT, 1976

REFUSAL OF CLAIM

TRIBUNAL : MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
HARRY L SINGER,
LOUIS A. RICE, MEMBERS

COUNSEL : BRIAN M. CAMPBELL, representing Corporation
ERIC M. KELDAY, representing Applicant

DECISION : NOVEMBER 19, 1980

This hearing was held on November 19, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing in the presence of the two Members, who concurred, the Chairman gave an oral decision:

The Tribunal makes no finding at this time as to whether or not the meeting of July 15, 1980, was a conciliation meeting or as to whether the report issuing therefrom was or was not a conciliation decision or a conciliation within the meaning of section 17 of the Act.

Notwithstanding the provisions of section 13(6) of the New Home Warranties Plan Act, 1976, the Tribunal finds the questions and points likely to be at issue in this proposed appeal by the Applicant to this Tribunal are presently before the Supreme Court of Ontario. In short, the Tribunal finds the High Court Justice a branch of the Supreme Court of Ontario is presently seized of this matter. If that action proceeds to judgment, this Tribunal will be bound by that judgment of the Supreme Court. Should the present action before the Supreme Court be abandoned however, the Tribunal will be willing to reconsider the question of its jurisdiction. In the circumstances as presently indicated, it is the decision of this Tribunal that it does not have jurisdiction in this matter and the Tribunal's order shall go accordingly.

MR. & MRS. J. PITNEY

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
WATSON W. EVANS, C.A.
LOUIS A. RICE, Members

COUNSEL: BRIAN M. CAMPBELL representing Corporation
JOSEPH PITNEY - in person

DECISION: JULY 23, 1980

This hearing was held on July 23, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing the Acting Chairman gave an oral decision.

This was a claim for relief by way of compensation for or repairs to a certain crack referred to in the evidence. The claim, brought outside the one-year warranty period, was in respect to what had been alleged to have been a major structural defect as defined by the statute and its regulations. The Tribunal found that the claimants failed to establish that a major structural defect within the meaning of the statute existed. The decision of the Warranty Program was upheld.

MR. & MRS. WALTER PRISTANSKI

APPEAL FROM DECISION OF CORPORATION DESIGNATED TO
ADMINISTER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
HELEN J. MORNINGSTAR
JOHN C. HURLBURT, P. ENG., members

COUNSEL: BRIAN RADFORD, representing Applicant
BRIAN M. CAMPBELL, representing Respondent

DECISION: FEBRUARY 8, 1980

The Applicants requested a hearing before the Tribunal after receipt of the Corporation's decision dated October 4, 1979, refusing their claim.

This was a hearing held on January 30, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

The Tribunal's decision was given orally as follows:

This was a hearing of the claim of Mr. and Mrs. Walter Pristanski on the guarantee fund established under the Ontario New Home Warranties Plan Act.

The purpose of this hearing has been to enable the Tribunal to determine whether it would be in order to direct the Corporation to take such actions as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations thereunder.

Section 13 of the Ontario New Home Warranties Plan Act provides under subsection (1)

"Every vendor of a home warrants to the owner,

- (b) that the home is free of major structural defects as defined by the regulations; "

Section 13, subsection (4) provides

"A warranty under subsection 1 applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed. "

Section 14 provides at subsection (c) that

"Where the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires, or such longer time under such conditions as are prescribed, the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations. "

A "major structural defect" is defined by subsection (m) of By-Law No. R-1 of the regulations to the Ontario New Home Warranties Plan Act as follows:

"(m) "major structural defect" means, for the purposes of clause b of subsection 1 of section 13 of the Act, any defect in workmanship or materials

- (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls . . . "

Upon the evidence the Tribunal is satisfied that such a major structural defect exists. In this case the Tribunal is much indebted to each of the witnesses and in particular to Mr. Wolfe although we cannot accept all of Mr. Wolfe's evidence, i.e. that the problem cannot be a result of improper grading. The grading may or may not have been a factor. However responsibility cannot be placed at the door of the owner since the approved grades do not provide for a reasonable runoff from the rear of the house (in the order of 2%).

We are inclined to accept the proposition that the cracks in this case were quite possibly caused by some sort of impact during or shortly following construction and that this was not immediately visible or visible during the earlier inspections which were conducted from time to time.

We feel that the presence of this problem became evident only gradually to the home owners and others. No fault is to be

attributed therefore to the officials who made the earlier inspections and found little or no serious damage.

The Tribunal Orders and Directs the Corporation designated to administer the Ontario New Home Warranties Plan Act to perform or arrange for the performance of such work as may be required to mitigate and repair the major structural damage complained of. The cost of such work to be paid for out of the guarantee fund established under the Act and the work to be completed not later than July 31, 1980.

ROBERT SCOTT CONSTRUCTION LIMITED

APPEAL FROM PROPOSAL OF REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT
REFUSE TO RENEW REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
W.W. EVANS, C.A.
REGINALD C. MARTIN, Members

COUNSEL: BRIAN M. CAMPBELL, representing the Respondent
AGENT: ROBERT SCOTT, representing the Applicant

DECISION: MARCH 27, 1980

The Applicant had requested a hearing after receiving notice of a proposal dated November 23, 1979 from the Registrar to refuse to renew its registration under the Act.

This was a hearing held on February 26, 1980, pursuant to section 9 of the Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before the Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing the Tribunal gave an oral decision.

The Tribunal finds that the Proposal of the Registrar dated November 23rd, 1979, is a reasonable one and that the Applicant has been given a full and adequate opportunity to comply with the Registrar's repeated and quite proper requests to supply financial statements. The Tribunal finds that no reasonable explanation has been supplied for the Applicant's failure to provide these.

The Tribunal therefore directs the Registrar to carry out his proposal in accordance with its terms.

The Tribunal notes, however, that the Applicant is not precluded from exercising its rights under section 10 of the Act to re-apply for registration at a later date.

HELGA SPARKS

APPEAL FROM DECISION OF THE CORPORATION DESIGNATED
TO ADMINISTER THE ONTARIO NEW HOME WARRANTIES PLAN
ACT
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
HELEN J. MORNINGSTAR
JOHN C. HURLBURT, P. Eng., Members

COUNSEL: BRIAN CAMPBELL, representing respondent

DECISION: JANUARY 31, 1980

The Applicant requested a hearing before the Tribunal after receipt of the Corporation's decision dated 5 November, 1979 refusing her claim.

This was a hearing held on January 30, 1980, pursuant to section 16 of the Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

The Tribunal's decision was given orally:

This was a hearing of a claim by the claimant, Helga Sparks, on the Guarantee Fund established under The Ontario New Home Warranties Plan Act.

The evidence discloses that Mrs. Sparks did not notify the Warranty Program of her complaint within the one year period specified in section 13(4) of the Act which reads as follows:

" A warranty under subsection 1 applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed."

In order to allow her claim in these circumstances, the Tribunal would therefore be obliged to find that the defect in question was a major structural defect which may be defined as "any defect in workmanship or materials that results in the failure of a load-bearing portion of any building or materially and adversely affects its load-bearing functions".

The Tribunal finds on the evidence which includes a letter dated January 25, 1980 received from the office of the Building and Plumbing Inspector of the Town of Tillsonburg over the signature of Harry Saelens that no such major structural defect is present. To the contrary, it is possible that the defect in

question is the consequence of normal shrinkage of materials caused by drying after construction as referred to in section 13 subsection (2)(d) of the Statute and that the claim might very well have failed even if it had been brought within the one year period. Therefore this claim must be disallowed and is accordingly disallowed.

ERIC STAIDLER

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT, 1976
REFUSAL OF CLAIM

TRIBUNAL : JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, C.A.,
LOUIS RICE, MEMBERS

COUNSEL : BRIAN M. CAMPBELL, representing Respondent
ERIC STAIDLER, in person

DECISION : FEBRUARY 13, 1980

This hearing was held on January 31, 1980, pursuant to Section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, Chapter 52 (hereinafter referred to as the Act) before The Commercial Registration Appeal Tribunal sitting at Toronto.

The applicant and his wife had entered into a construction contract with one Randy Gamble (Sunshine Builders Co.) for the construction of a home. The builder abandoned the project and failed to perform the contract. The applicant made a substantial number of claims against the respondent many of which were satisfied. A number of claims were disputed by the respondent either as to validity or as to quantum of damage. It is in respect of these claims that the applicant requested a hearing, pursuant to section 14 of the Act.

ITEM 1. PERMITS, INSURANCE PREMIUM - CLAIM \$225.00

The construction contract provided in clause 3 that the owners were to purchase the permits required to initiate home construction and in clause 13 that the owners were to purchase the insurance required to insure during construction. The builder was to reimburse the owners for these costs. The owners paid for these items but were not reimbursed. It had been agreed verbally between the owners and builder that these costs would be settled at the time of the final payment to the builder after home completion.

The applicant bases his claim upon a reading of the Act Section 14 (1) "Where a person who has entered into a contract with a vendor for the provision of a home has a cause

of action and damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract... the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations". The Corporation took the position that the claim was not valid on the grounds that the items are not to be considered "damages with respect to the home" within the meaning of Regulation 6(3).

The Tribunal finds that these items do come within the meaning of Section 14 (1) (a) and that these items are as necessary in the construction of a home as are bricks and mortar. The failure of the builder to reimburse for these items in accordance with the contract constitute a financial loss to the applicant. The Tribunal directs the Corporation to pay to the applicant the sum of \$225.00.

ITEM 2. LIEN DEFENCE - CLAIM \$977.00

The applicant had engaged solicitors with respect to a controversy respecting the claims of lien holders on the property, with respect to lien holdbacks and mortgage advances and incurred costs. The Corporation disputed the claim because it was not to be considered damage to the home. The Tribunal finds that these costs did not arise from a failure to perform the contract within the meaning of Section 14 (1) (a) and are accordingly disallowed.

ITEM 3. GARAGE FILL - CLAIM \$904.15

The builder used fill owned by the owners to fill in the garage in preparation for pouring concrete for the garage floor.

The applicant maintains that since the builder was responsible for the supply of all the materials necessary to construct the home there was a responsibility to provide this material directly and when he used the fill belonging to the applicant that the applicant had in fact paid twice for this material.

There is nothing before the Tribunal to substantiate this latter factor and accordingly the Tribunal disallows this claim.

ITEM 4. FILL USED UNDER THE SEPTIC SYSTEM - CLAIM \$2,595.00

The claim of the applicant herein is similar to the

claim in Item 3. The Tribunal makes the same finding and disallows this claim.

ITEM 5. LOAD OF GRAVEL - CLAIM \$85.00

A load of crushed stone was ordered by the builder but not paid for by him. The material was used under the concrete slab in the garage floor. When the vendor of the gravel could not contact the builder, the applicant paid for the gravel.

The Tribunal finds there is a distinction between the circumstances of this item and items 3 and 4. The provision of the gravel was the responsibility of the builder who had ordered it and used it with respect to the home and the Tribunal finds that in effect the applicant had paid for the gravel twice and accordingly had suffered a financial loss in this regard. The Tribunal directs the Corporation to pay the claim of \$85.00.

ITEM 6. REQUIRED FILL OVER SEPTIC SYSTEM - CLAIM \$1,525.00

According to the contract the builder was responsible for complete installation of the septic system. The Ministry of the Environment advised the applicant that upon inspection it had found the septic system inadequate.

The Tribunal directs the Corporation to meet the requirements of the Ministry of the Environment.

ITEM 7. ELECTRICAL HEATERS - CLAIM \$92.04

The furnace was not installed until six weeks after the applicants moved in and for the interval the applicant purchased electrical heaters to heat three of the bedrooms. The Tribunal finds that the cost of the electrical heaters do not come within the meaning of Section 14 (1) (a) as being financial losses resulting from the vendor's failure to perform the contract and accordingly disallows the claim.

ITEM 8. BASEMENT WINDOWS - CLAIM \$282.50

The construction contract stipulated that the windows shall be treble-glazed that need no painting. The builder installed in the basement double-glazed non-painted windows. The respondent was prepared to allow \$150.00 for the installation of additional panes but to make no allowance for painting the windows. The Tribunal finds that the windows were improperly installed by the builder and that the same should be rectified. The Tribunal directs the Corporation to pay the sum of \$282.50.

ITEM 9. GARAGE FLOOR - CLAIM \$2,775.00

There is a crack across the garage floor, and there is a subsiding of the floor at one side. In addition the surface is uneven and is spalling badly. The applicant obtained an opinion which referred to the crack as being "a severe structural crack" and that it was "necessary to remove the floor completely". The Corporation maintained that replacement was not warranted but that the crack could be filled in and the floor resurfaced to alleviate the depression. The intent was to attend to one-half of the garage floor. The Tribunal finds that the crack in the floor is not a major structural defect, and can be repaired without the necessity of replacement. However, the Tribunal finds that all of the floor should be attended to. Accordingly the Tribunal directs the Corporation to resurface the garage floor in a satisfactory manner or in the alternative, if the applicant is agreeable thereto to pay to the applicant the sum of \$500.00.

ITEM 10 FRONT PORCH - CLAIM \$1,395.00

It would appear that there is some deficiency in the surfacing and levelling of the front porch. There is no disagreement with respect thereto, but there is disagreement as to what is necessary to correct the same. The Tribunal finds that there is a deficiency in respect of the front porch and directs the Tribunal to resurface the same with requisite binding material. In this regard the Corporation should be mindful of the concern of the applicant with respect to the steps and entrance. If the Corporation and the applicant can arrive at a monetary settlement the Corporation is directed to pay the same.

ITEM 11. ALUMINUM SIDING - CLAIM \$3,850

It is admitted that the total aluminum siding was not installed in a good and workmanlike manner in that there is mismatching of material, and inadequate and improper installation. The applicant obtained an opinion that a correction entailed the removal and replacement of a great deal of the siding - whole walls. The Corporation disputed the necessity for entire siding to be removed and replaced. The Tribunal finds that the position of the Corporation is justified. The Tribunal directs the Corporation to replace the galvanized flashing with matching coated aluminum and where siding is irregularly cut, to replace it, and that the gable end should

be caulked, with all work to be done in a fashion that the total siding appearance will be unified and not that of a patched up job.

ITEM 12. BRICK POINTING - CLAIM \$350.00

The claim of the applicant was in respect of cracks which appeared after the original inspection and claimed beyond the one year period. The Tribunal finds there is no evidence to indicate that it is at this time a major structural defect. Accordingly the Tribunal disallows the claim without prejudice to the applicant with respect to future developments in this regard.

ITEM 13. TIME SPENT BY OWNERS - CLAIM \$457.50

On behalf of the respondent this claim was acceded to and accordingly the Tribunal directs the Corporation to pay the sum of \$457.50.

ITEM 14. EXPENSES BECAUSE OF THE TRIBUNAL - CLAIM \$407.00

The applicant made a claim in respect of (a) obtaining opinions from one Ted Smith with respect to certain items, (b) in respect of mileage, (c) in respect of other out-of-pocket expenses with respect to the attendance before the Tribunal. The Tribunal finds that the same do not come within the meaning of Section 14 (1) (a). The Tribunal has no jurisdiction to award costs in the circumstances of this matter. The claim is therefore disallowed.

The Tribunal hereby directs the Respondent to pay the monies or to perform the work as set out in respect of the various items herein.

BRUCE SUTTON

APPEAL FROM DECISION OF THE CORPORATION DESIGNATED
TO ADMINISTER THE ONTARIO NEW HOME WARRANTIES PLAN
ACT
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
HELEN J. MORNINGSTAR
REGINALD C. MARTIN, Members

COUNSEL: BRIAN M. CAMPBELL, representing respondent
BRUCE SUTTON, in person

DECISION: JULY 21, 1980

This hearing was held on July 17, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before the Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing the Acting Chairman gave an oral decision.

The Tribunal directed the Warranty Program to oversee the implementation by the builder of the solution that had been outlined in evidence by himself and by the Warranty Program's inspector namely, to install at the builder's expense a proper heating cable in accordance with official C.S.A. safety standards and at the same time to check or re-check the condition of the shingles and all venting and insulation.

JOHN W. TAYLOR

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT,
REFUSAL OF CLAIM

TRIBUNAL: JOHN YAREMKO Q.C., CHAIRMAN
HELEN J. MORNINGSTAR,
REGINALD C. MARTIN, Members

COUNSEL: BRIAN M. CAMPBELL, representing Corporation
J.W. TAYLOR, in person.

DECISION: JULY 18, 1980

This hearing was held on July 15, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before the Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing the Chairman gave an oral decision.

The Tribunal finds that Mr. and Mrs. Taylor purchased the home in question with a carport; indeed the carport was one of the factors for the purchase. The carport was at that time completed in all respects, and visually was in order, including a railway tie retaining wall in respect of its floor. The Tribunal finds that because of frost action the wall is in the process of collapse. The Tribunal finds that if the wall had been properly installed originally there would not have been the process of collapse. The Tribunal finds that the process of collapse is such that Mr. Taylor is prudent in not using the carport for parking.

Relevant to a determination of the matter is the application of Section 1(m) of the Regulations which reads: "major structural defect" means, for the purposes of clause (b) of subsection 1, section 13 of the Act, (that section under which, damages may be claimed).. any defect in workmanship or materials (i) that results in failure of the load-bearing portion or (ii) that materially and adversely affects the use of such building for the purpose for which it was intended... (the section continues)... including significant damage due to soil movement..."

On behalf of the Corporation Mr. Campbell has argued that because the columns and the piers supporting the carport roof show no sign of movement that there has been no failure of the load-bearing portion of the building. (The Tribunal finds that the carport is a significant and integral part of the building.)

Mr. Campbell also made a comparison with the failure of a driveway wall, taking the position that if there had been a failure of a driveway wall that would not be failure of the load-bearing portion and would not adversely affect its load-bearing function, with respect to the building.

The Tribunal is of a different opinion. The tie walls are to the floor what the columns are to the roof. Also there is a clear distinction between a driveway, and the floor of a car-port. If the progress of collapse were in respect of a tie wall with respect to a driveway leading up to the carport there would be validity to Mr. Campbell's argument. The floor of the carport which is a shelter for a car, is as significant to the carport as is the roof in respect of the relationship of the carport to the building. The process of collapse of the tie wall is such that it has materially and adversely affected the use of the building for the purpose for which it was intended. There may be a valid difference of opinion as to whether the floor may or may not be used at the present for purposes of parking but the Tribunal is of the opinion that it is not necessary to await the situation where there would be an imminent collapse to a degree as to physically prevent the parking of a car.

The Tribunal finds that the defects in the workmanship of the tie wall which have brought about significant damage to the floor due to soil movement, have materially and adversely affected the use of such building for the purpose for which it was intended, namely a shelter for a car, as part of the total use of the building.

Without imposing any responsibility on Mr. Taylor, it may be that he should have taken some steps to remedy the matter earlier and taken the advice that was proffered to him and the decision of the Corporation can be understood in the light of this non-action.

The Corporation is hereby directed to rectify the matter or, in the alternative to pay to the applicant the sum of \$960.00.

378086 ONTARIO LIMITED

APPEAL FROM PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REVOKE REGISTRATION

TRIBUNAL: MARIE ROUNDING ATKEY, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, C.A.
ALBERT LONGO, Members

COUNSEL: BRIAN M. CAMPBELL, representing the Registrar
AGENT: VINCENT DE BENEDICTIS, representing Applicant

DECISION: DECEMBER 17, 1980

At the conclusion of the hearing in the presence of the two Members who concurred, the Chairman gave an oral decision:

The Applicant requested a hearing after receiving a Notice of Proposal from the Registrar under the HUDAC New Home Warranty Program dated September 30, 1980 under section 9 of The Ontario New Home Warranties Plan Act (the "Act") proposing to revoke its registration under the Plan for the following reasons:

"Pursuant to the provisions of Section 8(2) of the Ontario New Home Warranties Plan Act, 1976 (the "Act"), the Registrar, having regard to your financial position, finds you cannot reasonably be expected to be financially responsible in the conduct of your undertakings as required by the provisions of Section 7(1)(c)(i) of the Act, TO WIT:

- (a) Debentis Investments Limited, the guarantor on this registration, declared bankruptcy as confirmed by receiving order dated August 8, 1980. "

The Manager of the Applicant appeared for the Applicant and made an excellent presentation. The Tribunal was impressed with the Manager's integrity and past building record.

However, the Tribunal, having carefully reviewed the evidence adduced and upon hearing argument for both sides, finds that the Registrar's Notice of Proposal was justified. The Applicant was granted registration and subsequent renewals under the Plan on the proviso that Debentis Investments guarantee the performance of the Applicant of its obligations under the Program and the Plan.

Since the August 8, 1980 bankruptcy of Debentis Investments the guarantee upon which the registration was based is of little or no value.

Without substantial net worth in the Guarantor, the Tribunal finds that the Applicant's net worth alone is inadequate to fulfill the requirements of section 7 of the Act.

The Tribunal therefore directs and orders the Registrar to carry out his Proposal.

The Tribunal notes, however, that the Applicant is not precluded from re-applying for registration under section 10 of the Act if its material circumstances have changed.

O. VALIALLAH

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT,
REFUSAL OF CLAIM

TRIBUNAL : MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR,
JOHN CORSI, MEMBERS

COUNSEL : BRIAN M. CAMPBELL, representing Corporation
Y. TIMOL, representing O. Valiallah

DECISION : JUNE 6, 1980

This hearing was held on May 14, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before the Commercial Registration Appeal Tribunal sitting at Toronto.

Osman Valiallah, the Applicant herein, and his wife Aisha Valiallah, as purchasers, entered into an Agreement of Purchase and Sale with Abode Two Limited, as vendor, for the purchase of a condominium unit (unit 93, Level 1) at the vendor's College Green development at 36 Towbridge Crescent, Brampton. The purchase price was to have been \$47,000 of which \$44,650 was to have been covered by a mortgage leaving a balance of \$2,350, of which latter sum \$500 is found to have been paid at the time of the execution of the contract and a further \$1,850 in the latter part of October, 1977, when the purchasers took possession of the unit. The date of the contract appears to be July 4th, 1977 and the date fixed for its completion (which never in fact took place) was September 30, 1977. Appended to the contract as Schedule "C" hereto and forming part thereof was an Interim Occupancy Agreement which provided for interim occupancy rent to be payable, in the event that the purchasers should take possession of the unit prior to closing, in the amount of \$327 per month until such time as closing should occur and also provided for the balance due on closing to be paid but without adjustments at the time of the taking such possession by the purchasers prior to closing and without receiving title.

The Tribunal finds that the purchasers took possession of the subject premises during the latter days of October 1977, and at that time paid the said additional sum of \$1,850 to the vendors which, together with the \$500 paid earlier made a total of \$2,350 paid by them against the purchase price of

the unit. This figure of \$2,350 has been and will herein be referred to as "the deposit". Upon taking possession without title the purchasers commenced payment of the interim occupancy rent of \$327 per month. By the terms of the occupancy agreement referred to such rent was not to be credited against the purchase price but was to cover occupancy only.

In her testimony, Mrs. Aisha Valiallah stated that she and her husband had initially planned and intended to move into their new home considerably earlier than they actually did. However, not only had the vendors been unable to provide the necessary deed of conveyance on the date fixed for closing but the actual construction of the premises had been delayed. In consequence of this, the Valiallahs who had sold their former home in Willowdale in evident anticipation of taking possession of their new home actually prior to the date fixed for closing, were obliged, during a couple of months in the early autumn of 1977, to rent alternative accommodation at \$500 per month which the witness testified occasioned additional unnecessary expense, including the cost of an extra, unexpected removal of furniture and household goods, together with great personal inconvenience, fuss and vexation. She stated that when they actually took possession of the subject unit, on or about October 29th, 1977, neither it nor the surrounding appurtenances or amenities of the College Green project were by any means wholly finished. However, they had practically speaking nowhere else to go and took the optimistic viewpoint that whatever construction or other obscure technical problems had impeded the acquisition of their chosen home up to that point, would soon be overcome. When they took possession in October 1977, Mrs. Valiallah stated that she and her husband hoped and fully expected to have title as full owners not later than the following January. This rosy view of good things to come was enhanced by the fact that they had been blessed by offspring, and in consequence, approved for an AHOP mortgage subsidy which, over a five-year period it was predicted, would produce a saving to their benefit of some \$6,000.

The Applicant and his wife did not become owners in January as they had hoped. The winter passed with their status, either as owners-soon-to-be or as some kind of tenants, painfully unsettled. In consequence they refrained from the outlays necessary to complete the comfortable furnishing of their home. But at least they had a roof over their heads and for this continued to pay the interim monthly rent in the sum fixed by the contract with the vendor. At the end of March hope was revived by a letter from Abode Two's solicitors, McDonald and Hayden reading in part as follows:

Abode Two sale to Valiallah
Unit 93
College Green Condominium

" Dear Mr. & Mrs. Valiallah:

We are solicitors for Abode Two Limited and our client has asked us to write to you concerning the delays which have been encountered in registering College Green under the Condominium Act.

We would like to assure you that Abode Two has taken and is continuing to take all necessary steps to have the condominium registered at the earliest possible time. Unfortunately, the process is one which involves a number of different levels of government and consequently there are many bureaucratic tangles...

Abode Two must also grant an easement to Brampton Hydro over a portion of the site...

We anticipate that these and other problems will be worked out shortly, that registration of the condominium will take place during April, and that the final closing including the registration of your deed to the unit will take place as soon after registration as possible.

In the meantime, we would request your co-operation in making prompt payment of your April rental. "

After their long and uncomfortable uncertainty (nine months having passed since they had signed the contract to purchase, six months since the original closing date, five since they had physically moved into the barely completed unit) these lines must have been most welcome to the Valiallahs and renewed their faith in the vendor's eventual ability to make title. They presumably noted in particular two statements or broad implications made in that letter: (1) that the delays were largely due to the vendor's inability to complete the project's registration under the Condominium Act (owing to the "different levels of government" and consequent "bureaucratic tangles"); registration of the condominium being shown to be the critical detail; and (2) that when the problem of registration under the Condominium Act had been settled (in April) as well as "other problems" such as the Brampton Hydro easement

referred to, which was surely minor, "the final closing including the registration of your deed to the unit will take place... as soon as possible".

It may be surmised in the light of the subsequent record that the "tangles" from which the vendor company at that point in time was endeavouring to escape were even more noxious and potentially fatal than those of the bureaucratic variety. The letter's final sentence, as well as the handwritten note in the margin, "please leave rent cheque with Sales or Construction office, see Lilly, Thanks, Steve", must have offered a clue, had the Applicant wished to see it, that the real problem besetting the vendor consisted in an acute shortage of funds.

The Applicants can scarcely be blamed for believing their problems were practically over when, in May, 1978, they learned that the Condominium Registration had finally been effected. Especially when that long-delayed, eagerly expected, allegedly critical happening was barely preceded by their receipt, from the Warranty Program, of a colourful and impressive Warranty Certificate, bearing three imposing signatures under cover of the following letter, typed entirely in capitals:

APRIL 24, 1978

O. VALIALLAH
36 TOWBRIDGE CRES
BRAMPTON, ONTARIO

RE: WARRANTY CERTIFICATE
R. 10-9811 H. 023074

DEAR ORIGINAL PURCHASER(S) OR THEIR SUCCESSOR(S) IN TITLE

CONGRATULATIONS ON YOUR PURCHASE OF A HOME BUILT BY A REGISTERED BUILDER UNDER THE HUDAC NEW HOME WARRANTY PROGRAM.

ATTACHED IS YOUR WARRANTY CERTIFICATE, SHOWING THAT THE COMMENCEMENT DATE OF THE 5 YEAR WARRANTY IS OCTOBER 31, 1977. THIS CERTIFICATE IS AN IMPORTANT DOCUMENT, AND WE SUGGEST THAT YOU SAFEGUARD IT CAREFULLY, AND REFER TO THE R. AND H. NUMBERS QUOTED ABOVE SHOULD CORRESPONDENCE WITH THE PROGRAM BE NECESSARY.

MAY YOU ENJOY YOUR NEW HOME FOR MANY YEARS.

HUDAC NEW HOME WARRANTY PROGRAM
(IN ONTARIO)

At this point in time, as appears from the testimony of the witness, the Applicant and his wife indulged in a sort of spending spree: they spent \$1,000 to finish the basement, hung \$1,200 worth of wallpaper, installed carpet to the value of \$500 and acquired \$2,000 work of appliances. There were certain other outlays mentioned as well, including a humidifier and storm door. "I fancied I soon was to become an owner", stated Mrs. Valiallah.

However, during the course of the summer of 1978, disillusionment set in. A postponed closing date set for June came and went, leaving the Valiallah's exceedingly disappointed. It seems that their solicitor tendered at this time and that the tender failed. They stopped paying rent. In July, Mrs. Valiallah testified that they were informed that the builder (or its President) had disappeared. She stated that to this day neither she nor her husband know exactly what happened to Abode Two Limited but that they believe it to be bankrupt and defunct. "All we know for sure is that they disappeared."

A final tender on their behalf was made on October 2, 1978, by their solicitor upon the solicitors for Abode Two Limited as described in the following letter of November 13, 1978. The funds returned to them as mentioned in this letter were presumably the balance of a retainer given to their solicitor at an earlier date:

November 13th, 1978

RE: Purchase from Abode Two Limited
Unit 93, Level 1, Peel Condominium
Plan No. 172

Dear Mr. and Mrs. Valiallah:

This will confirm that I attended at the offices of Messrs. McDonald & Hayden, the solicitors for Abode Two Limited, on October 2nd, 1978, and tendered on your behalf.

Accordingly, I am enclosing herewith my account for services rendered together with this firm's trust cheque payable to your order in the sum of \$240.00, representing the balance of funds due to you...

BONHAM & BATCHELAR

Robert G. Bonham

It seems that the Mortgagee of Abode Two Limited was the Federal Trust Company (with CMHC as Mortgage Guarantors) and from the testimony of the witness and from such evidence as was set before the Tribunal that Federal Trust went into possession as Mortgagee in possession at about this time. It seems Federal Trust contacted the Applicant and Mrs. Valiallah in the early autumn of 1978, indicating their position in the picture, and that this contact was continued during the ensuing months. Mrs. Valiallah testified that the position of this Mortgagee vis-a-vis themselves and their home was that they remained tenants under the interim tenancy arrangement and would still, eventually get title. "They told us to hang in there", she testified, "you will eventually get title." But the Valiallahs paid no further rent.

At the end of March, 1979, the agents of the Mortgagee in possession sent this letter to the Applicant and his wife:

March 27, 1979

RE: Occupancy Lease
36 Towbridge Crescent (Type D)

Dear Mr. & Mrs. Valiallah:

On instructions from Federal Trust Company (Mortgagees in Possession) and in accordance with the requirements of Central Mortgage and Housing Corporation (Mortgage Guarantors), we as agents for Peel Condominium Corporation #172 and Federal Trust Company, advise you as follows:

- (1) The premises you presently occupy will be offered to you on a lease basis only at this time.
- (2) The terms of the lease will be monthly and the tenant will pay utilities and rental equipment.
- (3) The lease will be with Peel Condominium Corporation #172 in trust, and the Condominium will be responsible for taxes, water and sewage, and common expenses on occupied units.
- (4) Rules and regulations of Condominium Corporation to apply.

- (5) Central Mortgage and Housing Corporation have indicated the first right of refusal when the properties are again put on the market FOR SALE. Subject to qualification for mortgage of applicant at time of sale.
- (6) The monthly rent will be as per schedule.
- (7) The lease is to be effective as of the 1st of April 1979.

In the event that you decide not to enter into this agreement Vacant Possession will be required.

Attached for your completion is a Standard Lease Application Form, together with Copy of Lease, Rules and Regulations.

Upon your completion of the Application to Lease and receipt of your Certified Cheque payable to Peel Condominium Corporation #172 (in trust) in the amount of the rent applicable, we will prepare the necessary lease for your signature.

Central Mortgage and Housing Corporation have stated that they will honour all leases in operation and Not in Arrears at time of take over by them as Mortgage Guarantors from Federal Trust.

Yours truly,

PEEL MANAGEMENT SERVICES

The rent required by this letter for the unit occupied by the Applicant was \$466 - quite an advance from the \$327 set out in the original interim occupancy agreement. Presumably they noted that vacant possession would be required in the event that they should "decide not to enter into this agreement". But they did not enter into it. What they wanted, at this point, still, was title. They decided to stand fast.

Subsequently, in the autumn of 1979, a further lease form was submitted to them by CMHC. This contemplated a monthly tenancy from November 1st, 1979, and at a figure of \$425.

Again, the Applicant and his wife declined to execute this lease. What they still wanted was a deed.

On December 5th, 1979, CMHC wrote the following letter to them, and yet another rental figure is here mentioned and that this figure, \$280, is deemed owing retroactively to July 1, 1979:

REGISTERED

Dear Mr. & Mrs. Valiallah:

Re: Occupancy Charges

Further to my letter of October 30, 1979, we have re-examined the rental rates set for College Green and are now able to advise that the monthly rent on the unit you occupy is \$280.00 excluding utilities.

As no rent has been remitted to us since July 1, 1979, the total amount owing Canada Mortgage and Housing Corporation is now \$1,680.00.

Effective January 1, 1980, \$280.00 will be due and payable on the first of each month until notified otherwise. As you are aware, we are presently negotiating the sale of College Green to Village Green Co-operative Homes Inc. and will keep you advised in this regard.

Mrs. Valiallah was next asked, towards the end of her examination-in-chief,

- Q. "What is presently the situation at College Green?"
- A. "It is co-operative housing - almost 95% occupied."
- Q. "Have any persons completed their Purchase and Sale Agreements?"
- A. "No."
- Q. "How many 'original tenants' (home owners) are there left?"
- A. "None. There were 116 originally and 100 units were occupied."

Q. "What has CMHC done with the development?"

A. "The units are now welfare homes as to 25%."

The Valiallahs have now moved into another apartment. It is on the 11th floor of a building in Willowdale. It cost slightly less than the College Green home was to have cost but is much less attractive or desirable. The benefit of the excellent AHOP mortgage warranty has been lost to them and the new financing arrangements are notably harder. They have been put to additional moving and conveyancing expenses. They have recovered some of their outlay for the carpet and appliances purchased in the spring of 1978 but calculate the net cost to them of their College Green experience at roughly \$9,500. This does not include their loss, about \$6,000, occasioned through losing the benefit of AHOP mortgage guarantee. Against this, they have had the benefit of rent-free accommodation since June, 1978. Calculated at the figure established in the Interim Occupancy Agreement forming part of the Agreement of Purchase and Sale, i.e. \$327 per month, this appears to come to the amount of \$4,905 for 15 months. It may be noted, in passing, that they may yet be liable to pay all or part of this.

On October 15, 1979, Mr. Valiallah wrote to the Warranty Program stating that he wished to claim against the guarantee fund established under the Act for the return of the deposit paid to Abode Two Limited. The proper forms were completed and filed. The claim was in the sum of \$2,350 being the aggregate of the \$500 paid at the time the Agreement of Purchase and Sale between the Valiallahs and Abode Two Limited was executed and the \$1,800 subsequently paid, in October 1979, when they took possession of their unit.

He eventually received this letter in reply to his claim:

January 16, 1980.

Dear Mr. Valiallah:

Re: Refund of deposit -
Abode Two Ltd.

Thank you for your letter dated December 21, 1979 and the documents attached thereto. The assessment of your claim for deposit refund has been completed and I regret to inform you that said claim has been found not valid.

In assessing claims of this nature, the Program look to the financial loss suffered by the claimant pursuant to the provisions of Section 14(1) (a) of the Ontario New Home Warranties Plan Act, 1976.

The perusal of the Interim Occupancy Agreement and the Statement of Occupancy indicates that rental payments in the amount of \$327.00 were due on a monthly basis. The period of occupancy is shown to be approximately 22 months, however, rent has been paid for only 7 months, leaving 15 months rent outstanding.

By comparing the deposit paid, \$2,350.00, with the rent outstanding, \$4,905.00, it is clear that you have suffered no financial loss, due to the Vendors breach of contract, and therefore no payment will be made out of the Guarantee Fund.

Yours truly,

HUDAC NEW HOME WARRANTY
PROGRAM

The present hearing has been by way of an appeal by Mr. Valiallah against that decision.

The subsection cited by the Claims Manager in his letter stating the Warranty Program's decision reads as follows:

14. - (1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

the person ... is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

and, as was pointed out by Counsel for the Program, that subsection (14 (1)) must be read with S.14(2) which follows:

- (2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

The limits are fixed by the regulations, at By-Law R.-4., as follows:

6. Limits of Liability

"(1) A purchaser who does not become an owner and who has a claim under clause (a) of subsection 1 of section 14 of the Act in respect of a purchase agreement is entitled to be paid out of the guarantee fund, for all damages claimed against the vendor for financial loss, an amount equal to all deposits owing by the vendor to the purchaser under the purchase agreement to a maximum of \$20,000."

The maximum limit of the Applicant's claim, therefore, is in the sum of \$2,350 which the Tribunal finds is the aggregate of all deposits owing by the vendor to the purchaser (viz., the Applicant and his wife) under the purchase agreement (notwithstanding certain representations made by Counsel for the Applicant).

The question now to be determined by the Tribunal is whether the damages payable to the Applicant out of the guarantee fund must be reduced pursuant to S.14(2) by the amount of "any benefit" received by the Applicant "from any source". We have been referred to the Tribunal's earlier decision in the case of MacDollum (8 C.R.A.T. p.61) which reads (in part) as follows:

...section 14, subsection 2, of the Act states that, in assessing damages, the Corporation shall take into consideration any benefit to the person.

The benefit received by the Applicants by way of occupancy rent is more than the deposit, and there can be no recovery from the Corporation.

Just how widely the words "any benefit from any source" are to be applied is not for the Tribunal to determine at this time, but presumably the context would operate to put some limit to this. The benefit of rent-free occupancy was held in the MacCollum case to apply as a deductible set-off since "the benefit received by the Applicants by way of occupancy rent (was) more than the deposit." In the present case the value of the rent-free occupancy has been estimated or liquidated at the sum of \$4,905, which is well in excess (i.e. by \$2,555)

of the deposit paid (i.e. \$2,350) which would in any event be the maximum amount claimable by the Applicant from the guarantee fund. Even if the figure of \$4,905, which has been calculated upon the basis of the monthly rent stipulated in the Agreement of Purchase and Sale (or "purchase agreement" as mentioned in 6(1) - viz., \$327 per month - were diminished by the difference between that agreed monthly rental and the lesser one (\$280) proposed by CMHC in its letter of December 5th, 1979, for the final six months of the rent-free period, the benefit would still amount to \$4,623 which is still \$2,273 in excess of the maximum refund which could possibly be paid from the fund.

The question arose during argument as to whether or not the back rent owing by the Applicant to the mortgagee in possession was the same as rent owing to the vendor for the purpose of set-off or deduction from any amount payable from the fund. It was suggested that only back rent owing to Abode Two Limited, one of the original parties to the purchase agreement, could be set off against the deposits paid to Abode Two Limited, and that the value of the rent owing to CMHC or Federal Trust was a benefit to which the Corporation or the Warranty Program could claim no entitlement. But the governing section of the Statute (S.14(2)) employs the words "from any source". The Tribunal finds that these words relate to the word "benefit" and supply the answer to the question posed, doing so specifically and unavoidably. The Tribunal finds that the Respondent, under the law as it is stated on the face of the Statute, and as it has been applied in the MacCollum case - a decision binding by precedent - is clearly entitled to set off the back rent owing by the Applicant to the original vendor's successors in title as being a "benefit" received by him "from any source".

The Tribunal feels considerable sympathy for the Applicant, whose case was presented with great force of able and skillful argument. However, it has no power to alter the law as it stands. The Tribunal has therefore no choice but to uphold the Registrar's decision. This claim against the guarantee fund accordingly must fail and it is hereby dismissed.

LORETO VICANO CUSTOM BUILT HOMES

APPEAL FROM PROPOSAL OF REGISTRAR UNDER
THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REVOKE REGISTRATION

TRIBUNAL : JOHN YAREMKO, Q.C., CHAIRMAN
WATSON EVANS, C.A.,
JOHN CORSI, MEMBERS

COUNSEL : K. P. LEFEBVRE, Q. C. representing Applicant
BRIAN M. CAMPBELL, representing Respondent

DECISION : MARCH 12, 1980

This hearing was held on March 5, 1980, pursuant to section 9 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, Chapter 52 before the Commercial Registration Appeal Tribunal sitting at Toronto.

On the 19th of December, 1979 the Registrar of Hudac New Home Warranty Program issued a Notice of Proposal to revoke the Applicant's registration under the Plan for the following reasons:

You have a breach of warranty within the meaning of subsection 8(2) of the Act.

Failure to diligently perform or cause to be performed all obligations imposed on you under the Plan under any agreement made by you with the Corporation in respect of the Plan.

Failure to indemnify and save harmless the Corporation and the insurer for the time being under any contract or contracts of insurance establishing the guarantee fund from any loss which they or any of them may suffer by reason of your failure to diligently perform or cause to be performed all obligations imposed on you under the Plan and under any agreement made by you with the Corporation in respect of the Plan.

Failure to respond to conciliation decision.

The Conciliation Decision was issued on the 12th of October, 1978, in part, as follows:

<u>COMPLAINTS AND OBSERVATIONS</u>	<u>DECISION AND BUILDER'S RESPONSIBILITY</u>
1. GAPS BETWEEN CERAMIC FLOOR TILES AND BASEBOARDS IN FRONT ENTRANCE HALL.	1. The clearance should be caulked with a silicone base type caulking, or suitably covered with a moulding.
4. CERAMIC TILES CRACKED AT THE BOTTOM OF MAIN STAIRS AND HALLWAY.	4. The ceramic floor tiles should be replaced to conform with Sub section 9.31.1.4 Ontario Building Code.
5. GARAGE FLOOR HAS IMPROPER SLOPAGE.	5. The depression should be remedied to prevent accumulation of water and consequent damage to the housewall structure.
6. IMPROPER SLOPAGE OF PATIO AND WATER COMES INTO HOUSE.	6. The poured in place concrete patio should be remedied to conform with Sub section 9.14.6.1. Ontario Building Code.

OBSERVATION:

The large poured in place concrete patio is improperly placed. Any rain-water, melting snow or ice would accumulate at the side door entrance.

The notice of the decision required the builder to commence work within 14 days and upon its failure to do so, the Program called for tenders and entered into a contract with Golfi General Contractor to proceed with the work for \$2,750 which was paid by the Program upon completion.

The decision was given orally by the Chairman at the conclusion of the hearing.

The Tribunal finds that there have been breaches of warranty on the part of the builder (Applicant) details of which are set out in Items 1, 4, 5, and 6 of Exhibit 5.

With respect to Items 1 and 4 there would appear to be no dispute.

The position of the builder with respect to Items 5 and 6 was that these difficulties were caused by subsidence of land. No evidence in this respect has been adduced by him. On the other hand, we have the testimony of Mr. Golfi, who did the remedial work, that at no time in respect of either items did he see those cracked lines which can be accepted as evidence of a subsidence. The Tribunal has been much impressed by the very clear way in which Mr. Golfi gave his testimony and accepts his evidence that the remedial work that he undertook which included the removal and replacement of the garage floor, and the steps taken by him with respect to the patio, were proper and necessary.

Mr. Vicano did not respond to the Conciliation Decision. Indeed, as late as the 21st day of December when he executed the Certificate his position was that he was not admitting the deficiencies.

With respect to Items 5 and 6, the Tribunal finds that there were shortcomings which ought to have been remedied by the builder. The decision casts no reflection on the general competence of the builder. However it would appear that he had taken early a certain position from which he did not wish to move even as late as December 21st in a matter which had been initiated by the homeowner by letter of May 12. There was ample opportunity for Mr. Vicano to establish on the record during that period of time exactly what he was prepared to do, and more clearly that he had been frustrated in his attempts.

Accordingly, the Tribunal finds that the registrant is in breach of warranties under section 8 (2) of the Act and in breach of his obligations under the Plan.

The Tribunal hereby directs the Registrar to revoke the registration of the Applicant unless the Applicant pays to the Program the sum of \$2,750 by the 31st of March, 1980.

WESTERN HOMES (LONDON) LIMITED

APPEAL FROM PROPOSAL OF REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT
REVOKE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
CAMERON HILLMER,
STEPHEN PUSTIL, Members

COUNSEL: BRIAN M. CAMFBELL, representing the Respondent
NO ONE APPEARING FOR THE APPLICANT

DECISION: JANUARY 31st, 1980

The Applicant had requested a hearing after receiving notice of a proposal dated September 17th, 1979 from the Registrar under Section 8 of the Act giving notice of a proposal to revoke the registration of the Applicant under the Plan for the reasons set out on the back thereof.

This was a hearing held on January 29, 1980 pursuant to section 9 of the New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before the Commercial Registration Appeal Tribunal sitting at Toronto.

The Chairman delivered an oral decision on behalf of the Tribunal, namely,

The Tribunal finds the Applicant, who had constructed a new home for a Mr. and Mrs. Charles Straub, which was conveyed pursuant to a Purchase Agreement dated April, 1978 with the Applicant, is in breach of a Conciliation Decision dated July 29, 1979 in that he failed to effect the necessary repairs to the subject premises as required therein and that he is further in breach of Conditions 3 and 4 of By-law 2 of the Regulations made under the Act (the Corporation having been obliged to disburse the sum of \$12,987 to effect repairs necessitated by the Applicant's said breach and which sum remains outstanding.)

The Tribunal finds further that the Applicant has committed a record of breaches of warranty within the meaning of Section 8(2) of the Act. The Tribunal further finds that the Applicant is also in breach of Section 4.4(2) of the Vendor/Builder Agreement entered into by him with HUDAC New Home Warranty Program on October 25th, 1978 in consequence of the foregoing.

The Tribunal has accepted the evidence of the Respondent which has not been contradicted in any respect. The Tribunal accedes to the submissions of the Respondent's Counsel that the

registration of the Applicant be revoked in accordance with the Respondent's Proposal.

The Registrar is hereby directed to carry out his Proposal to revoke the registration of the Applicant.

VICTOR F. WILCOX

APPEAL FROM DECISION OF THE
CORPORATION DESIGNATED TO ADMINISTER
THE ONTARIO NEW HOME WARRANTIES PLAN ACT
REFUSAL OF CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
WATSON W. EVANS, C.A.,
REGINALD C. MARTIN, Members

COUNSEL: BRIAN M. CAMPBELL, representing Corporation
AGENT: VICTOR F. WILCOX in person

DECISION: MAY 22, 1980

This hearing was held on May 9, 1980, pursuant to section 16 of The Ontario New Home Warranties Plan Act, 1976, Statutes of Ontario 1976, before The Commercial Registration Appeal Tribunal sitting at Toronto.

In this case the Tribunal has been unable to discover that a contract for the provision of a home ever existed between the putative vendor, St. David's Investments Limited, and the applicant herein, as purchaser. What we have seen is an option agreement, a contract between St. David's and Mr. Wilcox, which, had it been exercised in accordance with its terms, and at the option of the applicant, would have given him the right to have an Agreement of Purchase and Sale with St. David's. Such an Agreement of Purchase and Sale, had it come into existence, would have created a right, beneficial to the applicant, to make a claim, and quite possibly a valid claim, against the guarantee fund established under the Ontario New Home Warranties Plan Act. But that option, in point in fact, was never exercised and an Agreement of Purchase and Sale as contemplated by the Statute has never come into existence. On the facts, as they have been established, the Tribunal is obliged to find that no valid claim exists against the guarantee fund and that the claim must fail.

The Tribunal accordingly orders that this claim be and the same is hereby dismissed.

KENNETH HARRY ALLEN

APPEAL FROM PROPOSAL OF REGISTRAR OF
REAL ESTATE AND BUSINESS BROKERS
TO REFUSE REGISTRATION

TRIBUNAL : JOHN YAREMKO, Q.C., CHAIRMAN
MARIE ROUNDING ATKEY, VICE CHAIRMAN
PETER L. MASON, MEMBER

COUNSEL : W. ROBERT WILSON, representing the Applicant
A. N. MAJAINA, representing the Registrar

DECISION : DECEMBER 10, 1980

By application dated the 14th day of March, 1980, Kenneth Harry Allen (hereinafter referred to as Allen) applied for registration as a Salesman under the Real Estate and Business Brokers Act, intending to be in the employ of Century 21 Cobblestone Realty Limited (hereinafter referred to as Cobblestone), (David Morphy, President), a registered real estate broker corporation.

Question 6 of the form, namely:

"Will you be engaged or employed in
any other business, occupation or
profession?"

was answered in the affirmative with the "full particulars" thereof set as:

"Mortgage Broker"

By notice of proposal dated 22 May 1980, the Registrar issued a notice of proposal pursuant to Sections 6(1) and 8 (1) of the Act to refuse "to register the Applicant, Kenneth Harry Allen, as in the Registrar's opinion the Applicant is disentitled to registration as a real estate salesman under Section 6 of the Act."

In the notice of proposal the Registrar alleged:

"that Allen is disentitled to registration
as a real estate salesman for reasons set
out hereunder:

- (a) Cobblestone is a registered real estate broker corporation, which is operated by

individuals, such as its directors and officers, who are also registered as real estate brokers.

Subsection 4 of section 4 of the Mortgage Brokers Act, R.S.O. 1970, Chapter 278, and the regulations thereunder, as amended, states as follows:

"4.-(4) Every person who is registered as a real estate broker under The Real Estate and Business Brokers Act shall, so long as he is so registered, be deemed to be registered as a mortgage broker.

By operation of section 4(4) of The Mortgage Brokers Act, each registered broker, such as Cobblestone and each of its individual registered brokers, is deemed to be registered as a mortgage broker. There is, thus, imposed a very heavy and double onus on a registered real estate broker who, in a given situation, acts as a mortgage broker as well.

- (b) It may be noted that there is no statutory authority of a reciprocal nature by which a registered mortgage broker is deemed to be registered as a real estate broker. Further, such entitlement or authority, as provided in the said section 4(4), has not been extended to a mere registered real estate salesman. In the view which I take, therefore, a mere real estate salesman may, under the "deemed" registration of his real estate broker, be permitted to arrange or deal in mortgages to a limited extent.
- (c) Were registration of Allen as a real estate salesman permitted, he would have to be authorized by Cobblestone to arrange or deal in mortgages. The commission he earns thereby would depend upon arrangements entered into between Cobblestone and himself on the one hand and the registered mortgage broker on the other in a given situation.
- (d) An illustration of the conflict of interest thus becomes apparent, were registration of Allen as a real estate salesman permitted and if the registered mortgage broker

then happened to be Allen's own corporation, namely, Kanama. I state this advisedly as, in my belief based upon his years of involvement in the field of mortgage brokerage, Allen is considered to be the "alter ego" of the corporate entity, Kanama. Complex problems, e.g. those revolving around the duty of a fiduciary under the principles of the law of agency, under the Act and under the Mortgage Brokers Act could arise and these could involve, not only Allen himself but Cobblestone and Kanama as well.

- (e) Further or in the alternative, it is necessary, to consider the effect or implication which section 41 of the Act is likely to produce. This section states as follows:

41. No salesman shall trade in real estate on behalf of any broker other than the broker who, according to the records of the Registrar, is his employer, and no salesman is entitled to or shall accept any commission or other remuneration for trading in real estate from any person except the broker who is registered as his employer."

At the moment Kanama, through Allen as its "alter ego", "carries on business of lending money on the security of real estate, whether the money is his own or that of another... or carries on the business of dealing in mortgages" under The Mortgage Brokers Act. Were registration granted to him to become a real estate salesman for Cobblestone, the position of Allen under the said Section 41 becomes or tends to become incongruous or even untenable with his current status as the only person responsible for the continued operation of the mortgage brokerage business in the name of Kanama.

- (f) It is also my belief and opinion that the moment Allen is registered as a real estate salesman, if he is so registered, he might believe that he could also continue to act on behalf of his corporation, namely, Kanama, in connection with trades in real estate.

If Allen did continue to act on behalf of Kanama, when he and Kanama were not registered as real estate brokers, it would be considered that they acted in such a manner contrary to section 3 (1)(c) of the Act.

It is, therefore, my belief and opinion that Allen is carrying on activities that are, or will be, if he is registered, in contravention of this Act or the regulations, all within the meaning and contemplation of section 6 (1) (d) of the Act.

- (g) Further, or in the alternative, it is my belief and opinion that the granting of Allen's registration as a real estate salesman, in addition to the registration of Kanama as a mortgage broker, would effectively negate the public interest, protection of which is the purport and object of the Act and of The Mortgage Brokers Act as well."

As of about June 2, 1976, Kanama Investments Co. Limited (hereinafter referred to as Kanama) was registered as mortgage broker. The application, was sworn to by Allen as its president on June 1, 1976. It is noted that 20 common and equity (voting) shares of Kanama corporation were shown therein as held, in the number of 10 of each such shares, by Allen and his wife Bette, a housewife by occupation. The Registration has been renewed continuously and in the most recent renewal application dated 23 June 1980, in respect of a question #6:

"Will the applicant (or any partner, in the case of a partnership, or any officer or director, in the case of a corporation) be engaged, occupied or employed in any business, occupation, or profession other than the business for which renewal is requested?"

The answer was in the affirmative with a statement of "full particulars" set out in a Schedule A reading in part as follows:

"If Mr. Allen is (registered), it is his intention to work as a Real Estate Salesman for Century 21, Cobblestone Realty Limited, Brockville: if he is not, then the answer to Question No. 6, would be

"no" he will not be engaged, occupied or employed in any business, occupation, or profession other than the business for which the renewal is requested."

The Tribunal finds that the particulars, namely, "Mortgage Broker" set out in the application for registration herein refers to the mortgage brokerage business registered in the name of Kanama.

The Tribunal finds that Allen is the "alter ego" of Kanama, his wife playing a minor or secondary part in the mortgage brokerage business. He is the management and beneficiary of the operation of Kanama.

Only corporations, partnerships and sole proprietors were and are registered as mortgage brokers. Active directors and officers, even though involved effectually in bringing about or arranging mortgage transactions on behalf of the corporate broker on a day-to-day basis, are not registered as mortgage brokers. Allen describes Kanama Investment Co. Limited as "my company"; refers to his occupation with Kanama as "self-employed broker" and the 1979 Mortgage Brokers Licence is referred to as "Allen's". It is clear that Allen wishes and intends that Kanama continue to be registered and carry on its operations in the ordinary course.

The office of Cobblestone is located at 44 King Street East, Brockville, and Kanama, carries on the mortgage brokerage business at 46 King Street West, a short two-blocks distance away.

Kenneth Harry Allen has successfully completed the three required segments of the real estate course as required by the Real Estate and Business Brokers Act. Both David Morphy of Cobblestone, the Real Estate Broker and Allen the applicant have openly discussed the matter and agree any mortgage business arising from the Real Estate Company must be processed through the real estate brokerage.

The issue is quite clear:

Is a person who is registered as a mortgage broker (or who as in its present instance is the alter ego of a mortgage broker), by virtue of being such, disentitled to registration as a salesman under the Real Estate and Business Brokers Act? Regulation under both Acts will be referred to herein as "dual" registration.

The Registrar has historically taken the position that in such circumstances such an applicant is ipso facto disentitled; he has taken that position in the present instance. Any "dual" registration heretofore given has been under circumstances where the Registrar's attention had not been directed to that fact.

The provision for registration of agencies is set out in Section 6 of the Act:

6.-(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
- (c)
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2)

The Tribunal is of the opinion that the basis for refusal to register by the Registrar is restricted to the provisions of this section, i.e. the establishment of an exception to entitlement must be found within this Section of the Act.

There is no prohibition set out in either Act against "dual" registration.

The applicant testified that the reason for the application is to enable him to supplement the income obtained from the mortgage brokerage business which has fallen off. The Tribunal is of the opinion that this does not mean that he cannot reasonably be expected to be financially responsible in the conduct of his business. No other evidence in this regard was placed before the Tribunal. The financial position of Allen was unchallenged.

The determination is then whether entitlement comes within the exception of 6 (1) (b) or 6 (1) (d).

The history of registration provisions in the development of the statute are as follows:

The 1946 (original) Real Estate and Business Brokers Act, S. of O., Chapter 85, provided:

6. The Superintendent shall grant registrationto an applicant where in the opinion of the Superintendent the application is suitable for registration and the proposed registration is not objectionable.

a 1964 Amending Act, S. of O., Chapter 99 provided:

6.(1) The Registrar may grant registration to an applicant where the proposed registration is not against the public interest, and the registration may be subject to terms and conditions.

A 1969 Amending Act, S. of O., Chapter 105 provided:

6.-(1) An applicant is entitled to registration or renewal of registration except where,

(a) his financial responsibility or record of past conduct is such that it would not be in the public interest for the registration or renewal to be granted;

(b)

(c) the applicant is or proposes to be in contravention of this Act or the regulations.

In 1971, The Civil Rights Statute Law Amendment Act, S. of O., Chapter 50 in Section 76 (2) provided for the present provision set out above.

On behalf of the Registrar, it was submitted that, "while it may be contended that the Registrar under each Act is a creature of the statute and must act within the four corners of the Act", this may be so primarily and to an extent ... however, that whenever and wherever necessary, the Registrar is or should be in a position to exercise other powers, not specifically conferred upon him by the letter of the law, within the meaning

and contemplation of section 27(b) of The Interpretation Act:

The section reads:

"In every Act, unless the contrary intention appears,

where power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing;"

The situation described in the respondent's submission, (page 12), is not comparable to the present situation.

The Tribunal is of the opinion that there is no unspecified, implied or "understood" power of the Registrar to deprive an applicant of his entitlement to registration. There cannot be grounds other than specified in the Act, i.e. the Registrar does not have power based on a general interpretation of the various statutes and of the law to deny registration to Allen as a real estate salesman. The Tribunal finds that there is no obvious nor dominant nor latent intention of the legislature to prohibit a situation of a real estate salesman from engaging in the business of mortgage broker as well.

Counsel for the Registrar referred (Brief, Page 13) to Wenmore Financial Services (Commercial Registration Appeal Tribunal, August 7, 1980 unpublished). It will be noted that the basis for that decision was the application of an exception (financial responsibility) set out in the section.

Counsel for the Registrar also referred to the Western Ontario Credit Corporation Limited and Ontario Securities Commission (1975) 9 O.R. (2d) 93 (Brief, Page 14). It is to be noted that in that situation the Commission's opinion which is to form the basis for a decision is as to "the public interest".

On behalf of the Registrar it was cited and argued that:

"Moreover, where a regulatory tribunal, acting within its jurisdiction, makes an order in the public interest with the experience and understanding of what that interest consists of in a specialized field accumulated over many years, the Court will be especially loath to interfere... and that there was no misapprehension of the law applicable to the facts as found..."

However, it cannot be gainsaid that the making of the order must be based on a power, e.g. in the above specified situation, there was a power to determine what is in the public interest. Regardless of the high qualifications, ability and experience of the Registrar his decision must be based on a power granted within the authorizing legislation.

The Registrar's opinion that he deems it "to be contrary to the public good" to grant registration to Allen as a real estate salesman is not sufficient to be the basis of a proposal to prevent it.

If the legislature had deemed it necessary for the Registrar to have such a power it would have said so. Indeed, the historical development of the relevant section shows that the legislature was going in the opposite direction. "In the public interest" as a basis of action was removed from the section.

It is true that "the possible serious consequences" of taking away a man's livelihood are not to be of concern in regard to the interpretation of a provision; it is not the consequences, but it is the power to take away a man's livelihood that is to be considered. That power to refuse registration must be established; indeed there must be a clear granting by the legislature of that power. The title of the Amending Act "The Civil Rights Statute Law Amendment Act" indicates the extent of the legislature's view of the entitlement - it is a civil right.

The Tribunal is of the opinion that that "civil right" is not to be denied except on the basis of a criterion specifically set forth in the Act.

On behalf of the Registrar, it was argued that since by the Real Estate Act "No person... shall (b) trade in real estate as a salesman unless he is registered as a salesman of a registered broker, i.e. a salesman if registered could act for only "a registered broker", that an applicant could not be registered as a salesman of more than one registered broker. Further, it was submitted that a mortgage was "a trade in real estate" and that it followed that a salesman of a registered real estate broker could not be registered as a salesman of a mortgage broker. The Tribunal does not agree. A reading of the definition of "trade" in Section 1(m) clearly shows an exclusion of "mortgage". It was submitted on behalf of the Registrar: "The Act and the law of agency show that a real estate salesman can and should be the representative or act for only one broker as, for instance, see pages 23-25 herein. A broker, whether under The Mortgage Brokers Act or under The Real Estate and Business Brokers Act, is an agent. The real estate salesman,

to whom the principles of the law of agency apply as vigorously and forcefully as any broker-agent, cannot and should not be permitted to act on behalf of two agents, be they real estate brokers or mortgage brokers."

The Real Estate Act provides: "Every person who is registered as a real estate broker under The Real Estate and Business Brokers Act ... shall, so long as he is so registered, be deemed to be registered as a mortgage broker under this Act".

This is equivalent to a registration under both Acts, i.e. a real estate broker in the same transaction is permitted to render services under the two Acts, (i.e. act for two clients) in the same transaction. Such a provision is counter to the idea that "dual" registration ipso facto creates a "contravention of the Act or regulations" or that such a situation is one which under the general law of agency should not be permitted.

As a matter of fact, the applicant directed attention to two situations where there had existed "dual" registration or comparable activity without complaint from the public in respect of either aspect of operations.

The Tribunal notes in an aside the following excerpt from Western Credit Corporation Limited and O.S.C. (see page 100):

"In this connection Mr. Laidlaw said there had been a legislative omission in excluding from this paragraph a reference to the Mortgage Brokers Act, s. 4(4) of which says that every person registered as a real estate broker under the Real Estate and Business Brokers Act, R.S.O. 1970, c. 401, shall, so long as registered, be deemed to be registered as a mortgage broker under the Mortgage Brokers Act. Mr. Ross for the Commission conceded that this omission was inadvertent and said that an amendment of a reciprocal nature was contemplated."

On behalf of the Registrar it was argued in support of the entitlement coming within the exception of 6(1) (b) that "past conduct" of the applicant, i.e. his carrying on of a mortgage brokers business in the ordinary course and in accordance with the Statute "affords reasonable grounds for belief that he will not carry on business (within the meaning of the Real Estate Act) in accordance with law".

The Tribunal does not agree.

There is nothing in the specific conduct of the applicant which affords reasonable grounds, and the general conduct of a person having a "dual" registration does not ipso facto provide reasonable grounds for such a belief.

On behalf of the Registrar there were described a number of hypothetical situations, some of a very complex nature, which are put forward as supportive of either the exception in 6 (1)(d), or some overriding exception not specified, i.e. a negation "of the public interest".

On behalf of the applicant, it is submitted "that there will be no improper conduct or conflict of interest as a result of his registration as a Real Estate Salesman of Century 21/Cobblestone Realty and that the Registrar's objections are based on supposition, conjecture and mere possibilities that are not now nor have they ever been evident in any of the business conducted by the Applicant, Allen."

The Tribunal agrees with the position of the applicant and finds that registration under the Mortgage Brokers Act does not constitute "carrying on activities that are, or will be, if the Applicant is registered, in contravention of this Act or the regulations."

The Tribunal is not passing judgment on the concerns of the Registrar. It may be that his position against such a "dual" registration has merit. It may be that his rationale may be the basis for amendments to the Act to enable him to take action accordingly.

The language of the present Act is precise. It spells out the criteria which the Registrar is to use in the exercise of his authority to deal with applications for registration, i.e. the criteria upon which entitlement is excluded. The Tribunal finds that it has not been demonstrated that Allen's entitlement comes within any of the exceptions set out in Section 6.

Accordingly, he is entitled to Registration and the Tribunal directs the Registrar to refrain from carrying out his proposal and to grant the registration applied for by Allen.

The Tribunal is granted authority set out in the sections following:

"S.6(2)A registration is subject to such terms and conditions to give effect to the purpose of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations."

"S.9(5)The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act."

It was agreed that the primary purpose of both pieces of legislation is the protection of the general public, to ensure the public is dealing with competent and honest professionals. Compliance with each of the Acts and the regulations thereunder upon registration is the primary protection; the Applicant will have to so conduct himself that in respect of every action taken by him there will be no breach of either of the Acts or any of the regulations thereunder.

On behalf of the applicant, there were proposed the following terms:

1. Allen be bonded in the same manner as a real estate broker.
2. Any mortgage transaction arising from the real estate business be required to be recorded through the offices of the real estate brokers (Cobblestone).
3. Allen be required to maintain a separate statement of accounts and books, available to the Registrar for inspection, for all mortgage transactions originating through the real estate broker (Cobblestone), with which he may have been involved.
4. A contravention of any of these requirements would result in the forfeiture of applicant Allen's real estate salesman's licence.

The Tribunal is of the opinion that the proposed terms are not inappropriate. Accordingly, the Tribunal attaches the said terms to the registration.

NARINDER BHALLA

APPEAL FROM PROPOSAL OF REGISTRAR OF
REAL ESTATE AND BUSINESS BROKERS
TO REFUSE REGISTRATION

TRIBUNAL : MARIE C. ROUNDING ATKEY, VICE-CHAIRMAN
AS CHAIRMAN
HARRY L. SINGER,
SADIE MORANIS, F.R.I., MEMBERS

COUNSEL : PETER J. WILEY, representing Respondent
AGENT : WILLIAM M. JAMES, representing Applicant

DECISION : NOVEMBER 6, 1980

This hearing was held on October 29, 1980, pursuant to section 9 of The Real Estate and Business Brokers Act, before The Commercial Registration Appeal Tribunal sitting at Toronto.

At the conclusion of the hearing in the presence of the two Members, who concurred, the Chairman gave an oral decision:

By notice to the Applicant, dated September 22, 1980, the Registrar proposed to refuse him registration as a salesman under The Real Estate and Business Brokers Act on the grounds mentioned in section 6(1)(b), that is to say the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. The Registrar indicated that the reason for this decision was a conviction on March 3, 1980 on two charges of the offence of fraud and the facts upon which it was based.

The Tribunal finds that the Proposal of the Registrar was justified on the evidence.

The Tribunal therefore directs the Registrar to carry out his proposal to refuse registration to the Applicant.

The Tribunal notes, however, that the Applicant is not precluded from exercising his rights under section 23 of the Act to re-apply for registration at a later date once his period of probation has expired and full restitution has been made to all parties entitled thereto.

ROYAL LAND REALTY CORPORATION LIMITED,
CHARLES O

APPEAL FROM PROPOSAL OF REGISTRAR UNDER THE
REAL ESTATE AND BUSINESS BROKERS ACT
Century 21 ROYAL LANDS REALTY CORPORATION LIMITED
REFUSE TO RENEW REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C. CHAIRMAN
MATTHEW SHEARD,
W.J. BINGLEY, Members

COUNSEL: PETER J. WILEY representing the Registrar
ELLIOTT H. PEARL representing the Applicants

DECISION: JUNE 23, 1980

Century 21 Royal Land Realty Corporation Limited, and Charles O have been, since 1974, registered as brokers under The Real Estate and Business Brokers Act, R.S.O. 1970, c.401 as amended (the "Act"). These two parties will be referred to herein as "Royal Land", "Charles O" or the "Registrants" as the context requires. Charles O is President of Royal Land.

By application dated April 27, 1979 Royal Land and Charles O applied for renewal of registration as brokers under the Act.

On the 23rd of November 1979 the Registrar gave notice pursuant to section 9 of the Act that he proposed to refuse to renew the registrations as real estate brokers of Royal Land and Charles O based on the reasons and particulars set out therein.

The Tribunal finds as follows:

On the 29th of January, 1979 John Kaye, a Compliance Officer in the Ministry of Consumer and Commercial Relations, Business Practices Division, attended the premises of Royal Land at 2820 Danforth to initiate a routine inspection.

The premises at 2820 Danforth, owned by Royal Land, consist of two business floors: the first accommodates a receptionist and the general staff of Royal Land in small offices (cubicles) and open space with desks, and the second accommodates an office with filing cabinets at the front, a boardroom, and the office of the President, Charles O. There is also on the second floor substantial open space with desks and surrounding shelving loaded with items, being the premises of the operations of China Products Import and Export Corporation, of which Charles O is also Director, it being presently his major enterprise. Other enterprises controlled by Charles O are First Canadian Home Centre Limited and China Travel Agency Limited, each with head offices at 2820 Danforth Avenue.

After speaking to the receptionist, John Kaye was directed upstairs to the President, Charles O, to whom he explained the purpose of his visit. Charles O who was on the telephone at entry, reacted sharply and took the position that he would not give the books because he must be given notice of at least one month in writing; he would not show the books nor would he comply with the request. In any event he stated the Accountant was not in. He also advised that he was leaving on an extended business trip. John Kaye outlined the books that he required, namely trust ledger, bank statements with cancelled cheques, pending files and a reconciliation and stated he would be back the next day at 1 o'clock. Kaye did not see Charles O on the premises after the first day.

The Tribunal notes that it is not customary, nor a requirement, that notice be given, and such items are normally found in operating offices.

Upon his return at 1 o'clock on January 30th, Kaye requested to see the broker-manager, Leon Elfan, who advised him that Charles O was not in. Elfan said it would take a few minutes to get the books. Shortly thereafter he brought some deposit books and other items but not sufficient to make an inspection. Indeed the items were far from being complete for that purpose. Elfan went upstairs but did not bring any more documents stating that they were not available, that he could not give the trust or general ledgers because they were locked in Charles O's office and he did not have the key. Kaye telephoned his supervisor who spoke on the line with Elfan and indicated to him the provisions of Sections 24 and 25 of the Real Estate and Business Brokers Act.

An appointment was set for January 31st and Kaye advised Elfan what specific documents were needed, being material for the years 1977 and 1978 to the present. He met with Elfan who told him that he would not give any documents because Mr. O so instructed him. He stated the Accountant was there the night before, noted that they were not in order, and that he had to "fix" them in that there were some discrepancies. Elfan gave him a letter

"As our accountant is coming in on Saturday, February 3, 1979 we will be able to provide our books and records for your inspection anytime after February 5, 1979.

Kindly advise us in writing as to the specific documents you require."

On Kaye's visits Elfan always went upstairs giving the impression he was meeting someone. He also gave the impression he would like to co-operate but evidently was not instructed to do so.

It is to be noted that Mr. K. Yusuf, who acted in the place of Charles O in his absence, occupied an office on the second floor.

Kaye returned on February 5th as per an appointment with his colleague, Stephen Magyar, and was given records of 12 pending transactions and a few of the closed transactions in a cardboard box, together with trust bank statements and cancelled cheques from January to December 1978 but not the cheque stubs for that period. Kaye asked for the cheque books and the general ledger but was told that the latter was not available. He requested Elfan to call the bank to ascertain the balance in trust account but the information was refused because of lack of authority. He requested Elfan to get the information from Charles O or an authorization for the bank. Since he could not continue the inspection, he and Magyar left the premises. Having given a receipt therefore, Kaye took the documents with him in order to make photocopies. Kaye's examination of the documents showed some alteration in trust deposit slips and that files which were open, actually had been closed. There were certain disparities; there were instances where sums were transferred out to general account but the transactions to which they related had not been closed.

On the 9th of February 1979, R.A. Simpson, Director of the Consumer Protection Division issued an Order under Section 27a of The Real Estate & Business Brokers Act appointing William Dougan and John Michael Kaye to make an investigation.

Pursuant to the Order, Dougan went to the premises of Royal on the 12th of February, 1979 at 9:15 a.m. and asked for Charles O but he was advised that he was not available and he would be out of the country. Dougan would not speak to Yusuf who presented himself, because he was not registered as a broker and Dougan felt constrained by the secrecy provisions of the Act. Upon requesting to speak to someone in charge, Elfan introduced himself as a manager. Elfan said that Charles O had given him a real tongue-lashing for providing Kaye with the records he did provide, and had instructed him not to provide additional or any other documents. Dougan went over the Order which set out all documents and advised him that the Order stood and that Elfan should not obstruct. Upon contact with the Division's chief investigator it was suggested to Elfan that he call a lawyer. Shortly thereafter the solicitor for the Applicants arrived and Dougan advised him that he wanted to see all the files

for 1977 and 1978 with the 1978 files first, inclusive of trust ledger, cheque book, bank statements, cancelled cheques, trade record sheets and listing agreements. The solicitor's position was that if he were requested to get a specific file, he would do so. He said the files were locked but he would try and get them as named. He left Dougan and about 20 minutes later came back with a bundle of about 2 dozen files but they were not sufficient to satisfy Dougan; the solicitor brought a few more items and then left for the day. Elfan said that the files were in Charles O's office under lock and key and that Mr. Chan who kept the books had the key. Dougan returned on the 13th, 14th and 15th but still needed bank statements for the trust account and certain cancelled cheques which remained unavailable until the date of the hearing.

When the statements were produced the cancelled cheques which would have provided information were missing, and no cheque stubs were produced. There was a reconciliation statement prepared from bank statements but outstanding cheques would not show. On the reconciliation there were entries being carried which had been closed out and entries omitted which should have been in; accordingly, they were not of use. On the 2nd, 3rd and 4th days he tried to contact Chan to whom he was referred. The latter ultimately returned his call and told him he couldn't help because Charles O had the records.

Dougan prepared a summary chart in the office noting the pieces of information which were missing, and listing queries. His examination disclosed that deposit cheques were not being deposited within 2 days, and that certain deposit transfers were made when the deals were not closed and that in certain instances there was a second transfer out of the trust account. Accordingly, the trust account could not be reconciled. There were 4 pages missing from the real estate deposit books in the fall of 1978 and from time to time there were notations in the trust deposit book "Loan to Charles O", "Loan from Charles O."

Kaye prepared a list on the 19th of February. Kaye attended upon Royal Land and received certain documents on the 19th of February and the 22nd of February, (the latter being dropped off by Chan). The documents given did not comply completely with prepared list and were not sufficient. He contacted Elfan for more documentation as listed, but was advised that Elfan could not do anything more and that Charles O was overseas and would return in a month. Elfan delivered a letter

"Re: Cheque books and stubs Real Estate
Trust Account;
Seven cancelled cheques for March 1978
and three cancelled cheques for April
1978, all drawn on Real Estate Trust

Account #13034; Bank Statements for
Trust Account for January 1979.

Dear Mr. Kaye:

Please be advised that after repeated attempts to locate the above mentioned records, I am not in possession of such. I have provided you with all documents and records to which I have had access up-to-date."

Certain of the documents listed in the list were not made available until after the hearing had commenced.

On the 5th of March, 1979, at about 3:00 p.m. Dougan executed a search warrant at the premises of Royal Land. He enquired whether Charles O was available and was advised that Mrs. O was upstairs in the China Products office. Mrs. O advised that she did not have a key. Yusuf called a solicitor, Mr. Fields, who arrived at about 4:15 p.m. at which time Mrs. O produced a key from her desk and Fields opened the door. Charles O's office and Elfan's office were searched. There were a great many documents relating to China Products, but none of the documents referred to on the list.

At that time they became aware of the significant amount of money being transferred from the Real Estate accounts. The documents did not assist them in reconciliation of the Trust Account. The statements did not show whether the entries were related to transfers or cash withdrawals. Dougan was unable to determine whether there were any shortages in the Trust Account. He was advised that there was no general ledger kept, nor was there a capital account, for Charles O looked after capital accounts.

On the 15th of March, 1980, a meeting was held at the Division's offices at which were present Charles O and his solicitor, Fields, and J. Cohen a representative of the accounting firm of Richter, Usher. They agreed that there would be a reconstruction of the period 1977-78 and January 1979. Dougan reviewed his chart with them, pointing out that since sufficient records were not available he could not complete the chart, and that there appeared very obvious contraventions. A copy of the chart was given to J. Cohen. This document was later given by Charles O to Chan.

The undertaking was that the accountants were to work on the chart and get back in a week's time. A resume of the meeting is set out in the solicitor's letter of March 20th. About ten

days later, Dougan telephoned and left a message but got no response. Several weeks later he was informed that nothing had been prepared by the accountants who advised they were having some difficulty with Charles O, who did not want an audit of the period in question, but only of the current transactions.

On August 30, 1979, Charles O visited Dougan and advised that Chan, his accountant, had all the records and would be prepared to sit down to discuss the problems. It was suggested that Chan deliver and leave the records but Charles O would not agree.

On September 11th, 1979 Charles O wrote to the Registrar complaining about Kaye and Dougan and about Richter, Usher taking the position that the latter were not hired by him. He maintained that "our books (are) in order."

On the 24th of September the Registrar replied to Charles O enclosing a copy of solicitor's letter March 20th. The Registrar gave Charles O until mid November to produce the records as outlined therein. On November 6th Charles O requested Exhibit 16, an appointment "in regards to the inspection of our books and records as outlined in your letter of September 24th."

On November 15th Mr. Pearl, now solicitor for Charles O, came to the office with Chan, Elfan and Yusuf with two boxes which upon uncrating contained the files which had already been inspected with some additions. Dougan suggested that they be left. Pearl wanted Chan to be there when the documents were examined and said it would not be satisfactory to leave them. Dougan was advised that Charles O had retained another firm of accountants, Hattin, Moses, and they would be preparing a statement. Dougan was not informed that Chan was now as a senior student with Hattin, Moses and was to work on the records. There was to be a written request for 3 more weeks time, but no such request came forward.

On the 23rd of November, 1979 the Notice of Proposal was issued and this hearing ensued.

The Tribunal notes that in July, 1975 Douglas Greenwood, a Compliance Officer with the Division, had made a routine first inspection of Royal Land. He dealt with Charles O and Mrs. O. He ascertained that basic records were not available. Charles O by his own admission, was not a bookkeeper and was not familiar with what documents were required. Greenwood outlined them to him and wrote a letter pointing out the deficiencies in the record keeping. Greenwood advised "All deposit slips from date of registration, April 16, 1974, to May 1975, be identified by trade numbers, where applicable, or otherwise the deposit should indicate the source of the monies(3). It is advisable that

you consider setting up and maintaining a Cash Receipts and Disbursements Journal, and a General Ledger." Greenwood made another inspection in June of 1975, being a routine follow-up. There had been significant improvement in the records but there was needed clarification of the banking records for the Trust bank account had not been reconciled. Mr. & Mrs. O were co-operative at the time.

At the Tribunal hearing after the evidence on behalf of the Registrar there were filed as an exhibit monthly trust reconciliation sheets from January 1977 to February 1979 prepared by Hattin, Moses.

The Tribunal adjourned the hearing at this juncture to enable Dougan to examine these and other material now to be made available. Dougan's examination still raised doubts as to the accuracy, and his evaluation led to an opinion that there was a shortage in the Trust account from month to month in varying amounts. Dougan's analysis as of May 27, 1980 of various transactions based on the information available to him at the time, indicated contraventions of the statute and the regulation respecting trust accounts.

Upon the resumption of the Tribunal hearing on June 2nd, Chan produced a working paper as a result of a system which he especially devised in order to reconstruct the financial operations of the Registrants for the period concerned. The system was based on assigning to credit and debit entries in the trust account bank statements, sequence numbers, and thereby tracing the paying in and the paying out of the monies related to any specific transaction. Chan did not rely on the original notations on the cheques in order to establish the facts thereof because in many instances they were in error. Exercising his judgment with respect to the date of deposits as related to transactions, he corrected the notations on the cheques in order to make them conform to his restructuring of the financial transactions during the period. For example, if a deposit were made on September 7th, he would examine the trade records and form a judgment with respect to the transaction in respect of which that was to be taken as the deposit in trust. Subsequently on transfers to the general account (sometimes referred to as surplus deposits) he would assign a sequence number or several sequence numbers to form the aggregate, for the cheque based on the time of the closing of the real estate transaction(s). Though this system did provide plausible explanations (based on the assumption that Chan's identification of transactions had validity) there was no assurance that they were correct. The system was far short of the kind of validity that would be had if the original notations had been complete, continuous and accurate, and if they had in turn been supported by cheque stubs and/or entry in a general ledger records.

Based on Chan's own computations there were instances where deposit cheques had been deposited late, and transfers had been made early. Indeed transfers had been made where the transactions had not been closed. It is noted that Chan had available to him for his restructuring all of the material which took the Ministry officials from January 1979 to and including the Tribunal hearing to obtain. The Tribunal notes that the cancelled cheques referred to were made available to Dougan after the adjournment of the hearing on May 5th. Dougan prepared his examination of the working paper and supporting material noting the changes which had been made on the documents unaware, as Chan was to testify upon resumption of the Tribunal hearing that the "changes" were notations made by Chan during the process of the reconstruction of the financial transactions.

The real estate operation Charles O commenced in 1974 had built up during the next three years but had slackened off in 1978 and in 1979 to the degree that the operation was at a loss during 1979. During this latter period Charles O played less and less an active role in the day to day operation of Royal Land, depending upon Elfan as manager-broker and on one Monk as inhouse bookkeeper for the details of the transactions. However, during this period he retained either directly or through Yusuf the ultimate responsibility. He was the sole signing authority for the cheques on the trust account. It was his signature that appeared on all the cheques relating to withdrawal (transfer). These cheques bore the notations which subsequently had to be revised by Chan in order to bring some semblance of order to and a form of reconciliation of the transactions. During this period the number of listed transactions was about 150 during which time there was a maximum number of some 79 sales persons.

China Products Imports and Exports business expanded very rapidly after its inception in October 1976, becoming a multi-million dollar operation occupying latterly the bulk of the time and attention of Charles O and requiring his absence on its business from the premises where the realty business was carried on.

The Tribunal is of the opinion that Charles O continued his real estate activities not as a primary interest but as secondary to his other goals and ambitions.

Relevant sections of the Act are:

Section 25.-(1) The Registrar or any person designated by him in writing may at any reasonable time enter upon the business premises of the registrant to make an

inspection to ensure that the provisions of this Act and the regulations relating to registration and the maintenance of trust accounts and the regulation of trades are being complied with.

Section 26.-(1) Upon an inspection under Section 25, the person inspecting,

- (a) is entitled to free access to all books of account, cash, documents, bank accounts, vouchers, correspondence and records of the person being inspected that are relevant for the purposes of the inspection;
.....

and no person shall obstruct the person inspecting or withhold or destroy, conceal or refuse to furnish any information or thing required by the person inspecting for the purposes of the inspection.

Section 27a-(3)" No person shall obstruct a person appointed to make an investigation under this section or withhold from him or conceal or destroy any books, papers, documents or things relevant to the subject-matter of the investigation.

Section 30.-(1) Every broker shall keep a trade record sheet in the prescribed form and proper books and accounts with respect to his trades and shall enter therein in the case of each trade,

- (a) the nature of the trade;
- (b) a description of the real estate involved sufficient to identify it;
- (c) the true consideration for the trade;
- (d) the names of all parties to the trade;
- (e) the amount of deposit received and a record of the disbursement thereof; and
- (f) the amount of his commission or other remuneration and the name of the party paying it.

(2) Every broker shall maintain a trust account for every person from whom trust moneys are received in which shall be entered full details of all trust moneys so received and disbursements therefrom.

Section 31.-(1) Every broker shall maintain an account designated as a trust account in a chartered bank, loan or trust company or Province of Ontario Savings Office in which shall be deposited all moneys that come into his hands in trust for other persons in connection with his business, and he shall at all times keep such moneys separate and apart from moneys belonging to himself or to the partnership, in the case of a partnership, and shall disburse such moneys only in accordance with the terms of the trust."

The relevant section of the Regulation is Section 20.-(3).

"Every deposit received by the broker whether by cash, cheque or otherwise shall be deposited in the broker's trust account within two banking days of its receipt."

The Tribunal finds that the records by the Registrants fell far short of those required to conform with the intent and language of the Act. The records were innacurate to a degree which may be described irresponsible from the point of view of providing the basis upon which an examination could be made in order to ascertain compliance with the statute, in particular with respect to the trust account and trust monies. Indeed if the inadequacy, innacuracy and disorganization of the Royal Land records were accepted as sufficient, there would be a mockery of the intent of the legislation passed for the protection of the customer as a purchaser under a purchase agreement who has given monies to be held in trust. The 'records' sections are amongst the most significant. The irresponsibility must be attributed to Charles O who in his blind acceptance of what was placed before him and in his total lack of interest in, and failure at any time to check out, background material, displayed a complete disregard of what is expected of one who wishes to be registered in a business which requires high standards of competence and compliance.

The Tribunal finds no fraudulent action in fact or intent on the part of Charles O in the contraventions of the statute and regulations which occurred with respect to the dealings with trust monies; the Tribunal finds no evidence of dishonesty in respect of trust monies by Charles O. The Tribunal

finds no circumstances of financial difficulty on the part of the Registrants. However there was lacking that integrity in the operation required by the statute and which the Tribunal accepts as the maintenance of a sound operation with adherence to basic principles, both in relation to the customers of the business and to the authorities charged under statute with the supervision thereof.

The delays in the deposit of certain deposit instruments given are an indication of the lack of discipline which prevailed in the operation, and the laxness with which some of the transactions were dealt. The early withdrawals and/or transfers from the trust account of which the Tribunal finds there were a number, are a result of the inadequacy and inaccuracy of the details of financial transactions, the responsibility of the Registrants. For example, it may be accepted that the deposits in respect of 45 Edgewood and 616 Manning Avenue were errors of the bank, but it is an indication of the complete lack of worth of the records that it took over a year and an investigation to establish these errors. In the ordinary course and with the simplest of procedures the errors should have been discovered the following month.

The irresponsibility of Charles O with respect to the records is highlighted by the fact that upon the inspection following registration by Greenwood, the shortcomings of the records had been pointed out to him as well as what was necessary for compliance with the statute. Though Charles O may have co-operated with Greenwood at the time, it is clear that in recent years there had been what can be accepted as no effort to maintain records which would be in compliance with the statute and which would enable the Ministry to discharge its responsibility to the public for whose protection the legislation had been passed. The records should be of a kind that enable ready monitoring by the Registrar.

The Tribunal finds that Ministry officials attempted from January, 1979 up until November 15th, 1979 to obtain satisfactory accounting of the financial operations of the Registrants but not at any time were they placed in a position to form any rational assessment of the operation. They had no alternative but to proceed on the basis that there had been continuous and serious breaches of trust account requirements.

Under Section 26.-(1)(a) the inspector was entitled to free access to "all books of account ... documents, bank accounts, vouchers, correspondence and records." i.e. untrammelled access

to everything related to a transaction of a trade in real estate. This provision is also most significant to the protection of the public.

A review of the attendances and requests by the inspector and the investigator, and the responses thereto both as to time and action on behalf of the Registrants shows the very antithesis of what the legislature directed.

During all of the inspection and investigation period, which lasted almost a year, no real attempt was made by Charles O to ascertain what the records situation was and to involve himself so that a satisfactory response might be made. Far from acknowledging the responsibility of the Ministry officials to inspect, his attitude was that of a person aggrieved. There was nothing of co-operation in his attitude, nor did he actively try to ascertain and resolve the difficulties encountered by the Ministry officials: indeed the contrary was the case. This is extraordinary for a person whose registration is so directly related to compliance with statutory provisions.

It is not enough to say - the inspection discloses no impropriety - if that inspection requires the kind of effort and time that had to be expended by personnel of the Ministry in this matter.

The Tribunal finds that during the period of January 29th to March 5th the inspector and investigator appointed by the Ministry were in fact obstructed in obtaining the records for a proper review and had to resort to a search warrant.

The Tribunal finds with respect to certain of the transactions of the operations of the Registrants:

- (a) trust moneys have not been disbursed in accordance with the terms of the trust Contrary to Section 31.-(1) of the Act.
- (b) deposits have not been deposited in the trust account within two (2) banking days of their receipt as required by Section 20.-(3) of Regulation 769 under the Act.
- (c) The Registrants failed to keep and maintain proper books and accounts with respect to trades as required by Section 30 of the Act.
- (d) The Registrants failed to enter in trade record sheets the information required by Section 30.-(1) of the Act.

The Tribunal further finds;

- (a) The Registrants have, during the period of time commencing January 29, 1979 to the present, obstructed persons making an inspection, and have withheld, concealed or refused to furnish information and documents required by these persons for purposes of the inspection Contrary to Section 26 of the Act.
- (b) The Registrants obstructed persons appointed to make an investigation under Section 27a or withheld from them books, papers, documents or things relevant to the subject matter of an investigation Contrary to Section 27a.-(3) of the Act.

The Tribunal is of the opinion that;

- (a) The past conduct of Charles O and Royal Land affords reasonable grounds for belief they will not carry on business in accordance with law and with integrity.
- (b) The past conduct of Charles O, an Officer and Director of Royal Land, affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity.

THE TRIBUNAL DIRECTS the Registrar to carry out his proposal to refuse to renew the registrations of the Registrants Royal Land Realty Corporation Limited and Charles O.

CAROUSEL TRAVEL INC.

APPEAL FROM DECISION OF THE BOARD OF
TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
REFUSAL OF CLAIM

TRIBUNAL : MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
MARIE C. ROUNDING ATKEY,
PETER BONCH, MEMBERS

COUNSEL : MICHAEL D. LIPTON, Q.C., representing Respondent
VICTOR L. PALERMO, representing Applicant

DECISION : OCTOBER 9, 1980

This was a hearing held on September 3, 1980 pursuant to section 15a of Ontario Regulation 367/75 made under The Travel Industry Act, 1974, before The Commercial Registration Appeal Tribunal sitting at Toronto.

Upon hearing the evidence of Victor L. Palermo, an officer of the Corporation which is the claimant herein, the Tribunal finds the following facts. The claimant was and is a travel wholesaler as defined by the Act and its Regulations and as such, at the time when the events leading to this dispute took place, was providing vacation bookings on a certain flight from Buffalo to Freeport on March 15, 1980 with a return flight on March 22, 1980, known as the March 15-22, 1980 Freeport Charter. Notwithstanding that the claimant, as a travel wholesaler, normally and customarily required payment 42 days in advance for all such bookings provided by it to travel agents, in this case the claimant was requested to make a special exception to its usual practice and to provide a single late booking for the Freeport Charter in favour of a client of Travel Mate World Travel of Toronto (a travel agent within the meaning of section 15 (2a) of the Schedule to the Regulations under the Act) whereby the client was enabled, as a result of certain telephoned instructions made by the claimant in compliance with the travel agent's request, to pick up his ticket at the airport immediately prior to departure. This request was made at the last moment, on the very day of the Freeport Charter's departure, viz. March 15, 1980

The Tribunal accepts the testimony of Mr. Palermo that the claimant had no intention, when making this booking, of extending credit to the travel agent but that, to the contrary, the claimant took steps (ineffectual as it happens) to avoid that through requiring an assurance from the agent, when the request for this late booking came in on the telephone and on the very day of the departure flight, that a cheque to cover the cost involved in the sum of \$505.60, had actually been issued and written out by the agent and also actually placed into the hands of a courier for transmission to the claimant.

In accepting this evidence, anything but ideal in a good many ways, the Tribunal uses its privilege to relax evidentiary rules in what it considers a suitable case. Mr. Palermo, a non-practicing member of the Ontario Bar in good standing, did not impress us as one who would knowingly give less than the whole truth under oath or attempt to twist the facts for the sake of \$500; far from it, the witness seemed a man of integrity, in attendance at the cost of considerable expense and inconvenience, largely as a matter of principle.

It subsequently transpired that the ticket for the Freeport Charter was picked up at the airport and the client took his trip but that no cheque to cover the claimant's proper charges for it, numbered 840 or otherwise, was ever delivered to the claimant - by Altours courier service or anyone else.

The claimant then made claim upon the Compensation Fund pursuant to section 15 (2a) of the aforementioned Schedule to the Regulations made under the Act for a refund of \$505.60 as "that portion of the client's moneys received by the travel agent that the travel agent failed to pass to the travel wholesaler" and which represented the total cost of the Freeport Charter supplied as shown on the claimant's invoice to the agent, less commission.

The Tribunal is satisfied that the claimant had been assured by the travel agent that the client's monies had passed to it and was entitled to rely upon that. The Tribunal is satisfied that in all reasonable probability the travel agent had been paid by its client for such is the invariable custom of this industry, whose product, as was pointed out, once it is delivered, can never be repossessed.

The Tribunal is further satisfied that the claimant had, for all practical purposes, exhausted all other available remedies against the agent to collect the \$500 owing to it before claiming against the Fund. It is incumbent upon a claimant against the Fund to do this, but in the case of a claim for \$500, the production of a certificate of nulla bona resulting from a judgment followed by an unsuccessful distraint or levy, or to ask for the claimant to have gone through the creditors' remedies set out in The Bankruptcy Act, would surely be to defeat one of the Act's cardinal intentions, namely, to be fair and also to be reasonable, in its provision of just and fair relief, according to the varying circumstances of each case.

What the Board of Trustees apparently relied on in refusing this claim was the notion that the claimant's loss arose from a sloppy business practice which amounted to a failure to act in good faith or at arm's length within the meaning of section 15 (2a) of the Regulations of The Travel Industry Act.

Mr. Palermo stated that the officers of Carousel Tours were incensed at that suggestion, that their transaction with Travel Mate was other than "at arm's length", that they considered it preposterous, and that this was the principal reason for their having taken the trouble to bring this appeal.

At the hearing Counsel for the Respondent placed even greater emphasis on the words "good faith", also contained in section 15 (2a). The claim must fail, he argued, because the essential element of "good faith" was missing from the claimant's dealings with the agent, as well as the "arm's length" factor. "Good faith", he argued, means "sound judgment" and "prudence". To act in "good faith" one must act in accordance with sound judgment and good business practice. To take a cheque number over the telephone and to assume that a cheque is on its way by courier just because someone has so assured you and then to issue a ticket on that basis, is not "sound judgment", and is not "prudent", is not "good business practice" and is therefore not in "good faith".

Upon consulting the authorities as to the definition of the terms in question, the Tribunal rejects any suggestion that the claimant acted with any intention to defraud the Trustee of the Fund or that it had any prior notice of there being "something wrong" which "ought to have put it upon inquiry" such as to make its conduct "not honest".

The practice in question is a sloppy practice and it is easy to understand that the Registrar and responsible members of the Travel Industry despise it and wish to see it stamped out. Mr. Palermo himself described it as a "poor business practice". However, there should be ways to stamp out bad practices without having to impune the integrity and honesty of participants in the Fund and if there are no other means to block such claims arising from a bad practice they should be devised.

The Tribunal allows this claim and ORDERS and DIRECTS that the sum of \$505.60 be paid by the Respondent to the claimant.

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Summaries of
Decisions
Volume 10
(1981)

Commercial Registration Appeal Tribunal



Ontario

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Volume 10 (1981)



ONTARIO

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUMMARIES OF DECISIONS * - VOLUME 10
CITED 10 C.R.A.T.

- * This volume contains summaries of, and in some instances full decisions and reasons given. If reference to the exact decision is desired application should be made to the Registrar.

Published pursuant to the Ministry of Consumer
and Commercial Relations Act, Revised Statutes
of Ontario, 1980, Chapter 274

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

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384030 ONTARIO LIMITED O/A
FOREIGN OPPORTUNITIES LIMITED
JAMES THOMAS SHEA

APPEAL FROM PROPOSAL OF DIRECTOR OF THE
CONSUMER PROTECTION DIVISION
TO ORDER APPLICANTS NOT TO ENGAGE IN THE UNFAIR
PRACTICES SPECIFIED IN THE NOTICE OF PROPOSED ORDER
DATED MARCH 31, 1980

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD, MEMBER
HELEN J. MORNINGSTAR, MEMBER

COUNSEL: PAUL ROULEAU representing the Applicants
PETER J. WILEY representing the Director

HEARING
DATE: May 20, 1981

REASONS FOR DECISION AND ORDER

384030 Ontario Limited is a corporation incorporated under the laws of the Province of Ontario and carries on business under the name and style of Foreign Opportunities. Its head office is located at 308 Second Street East, Cornwall. James Thomas Shea is President and Director of the corporation and is also directly involved in the conduct of its day to day business affairs.

The Applicants hold themselves out to the public as being an Employment Consulting Service.

The Director is of the opinion that the Applicants hold themselves out to the public as having special expertise in assisting persons in obtaining foreign employment or advising them in connection with such opportunities. The Applicants' view of their operation is an "endeavour to match the skills and abilities of people in Canada and the United States with the needs of American companies doing business overseas".

On the 31st day of March, 1980 the Director of the Consumer Protection Division issued a Notice of a Proposed Order pursuant to Section 6 of The Business Practices Act, 1974, Statutes of Ontario, 1974, Chapter 131, to the Applicants (Respondents therein) to comply with Section 3 of the Act by ceasing to engage directly or indirectly in the following unfair practices:

"

1. Representing directly or indirectly or by implication or otherwise that the goods or services are available to the consumer when the person making the representation knows or ought to know that they will not be supplied contrary to section 2(a)(viii) of the Act, and in particular, that the purchaser of its services can expect to obtain suitable foreign employment.

2. Making a representation which uses exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact, if such use or failure deceives or tends to deceive contrary to section 2(a)(xiii) of the Act, and in particular that:

- (a) Numerous foreign job opportunities exist in various occupations and that these jobs are available to residents of Canada who purchase the Respondents' service.
- (b) The Respondents possess information concerning foreign job opportunities which would be of material assistance to a resident of Canada who is interested in employment overseas or alternatively that the Respondent will obtain such information for that person.
- (c) That the persons who agree to purchase the Respondents' service can expect to obtain suitable foreign employment.
- (d) That the Respondents are in a position to provide a service to Canadian residents which will assist them in a material way in finding suitable overseas employment.

3. Making any representation that is unconscionable because the consumer is unable to receive a substantial benefit from the subject matter of the consumer representation as provided in section 2(b)(iii) of the Act.

4. Making any representation that is unconscionable because the Respondents are making a misleading statement of opinion or which the consumer is likely to rely to his detriment as provided in section 2(b)(vii) of the Act. "

The Reasons for the Proposed Order are allegations that:

The Applicants (Respondents therein) in order to induce persons to purchase their services conduct the business in such a manner as to represent to the public that:

"4.

- (a) numerous foreign job opportunities exist in various occupations and that these job opportunities are available to residents of Canada if they engage the Respondents to act on their behalf.
- (b) The Respondents possess information concerning foreign job opportunities which would be of material assistance to a resident of Canada seeking foreign employment or alternatively that the Respondents are able to obtain such information for their customers.
- (c) The Respondents are capable of, and will in fact assist their customers in a material way in finding suitable foreign employment.
- (d) Persons who engage the services of the Respondents can expect to obtain suitable foreign employment, or alternatively that they will be greatly assisted to that end by the Respondents

or alternatively that the manner in which the Respondents conduct the business is such as to lead the customer to believe or to create the impression that such is the case.

5.

- (a) the foreign job opportunities as represented by the Respondents to their customers do not in fact exist, or if they do, they are not generally available to persons utilizing the Respondent's services.
- (b) Such services as are provided by the Respondents do not generally result in any or suitable employment, offers of employment, or even job interviews.
- (c) Such assistance as may be provided by the Respondents and the results thereof is not worth either the time or money paid by customers to the Respondents for such services."

The process of Foreign Opportunities in which a member of the public (client) finds himself involved is one that is attractive and

attractable. It is especially so when the frame of mind of the client is one that is receptive and eager, as it invariably is.

The sequence of events with which a client is involved in a dealing with the Applicants is as follows:

Client attention to Foreign Opportunities is generally drawn by an ad in a newspaper published in Ottawa, Montreal in the French or English language (see Exhibit No. 5(a)(b)(c)(d)).

The leading words of the ads are eye-catching - "OVERSEAS": "FOREIGN JOBS OVERSEAS; "OUTRE-MER". The introduction is such as to hit a responsive note: "Unemployed? Thinking of changing jobs? Maybe we can help". The next words verify a common belief: "American companies pay top wages to people working overseas. Many types of skill and talents required", and are followed by a broad recitation of trades and skills required. The structure of the ad is such that Foreign Opportunities appear to play an active role in the placing. Indeed, in the French ad, the words are "Nous avons besoin de bien des genres de talents et d'aptitude, par exemple:....". The ad may or may not have the words 'non-agency' and/or 'fee' at the end thereof.

Client telephones in for information and following a 'script' recited by the secretary (receptionist), if he or she is still interested in the service, an appointment is set up to come to the office for additional information.

The script is one that is rigidly devised, monitored and controlled, so that apart from a statement as to the large number of companies doing work overseas, etc., no information is given as to the procedures or services of Foreign Opportunities. For that kind of information, the client must come to the office. The words and delivery are such as to invite the setting up of an appointment. Exhibit 55 in this regard speaks of "the beginning of the pitch" and putting "the client on hold" to "check if we want to make an appointment".

Client upon arrival at the office is given a brochure "OVERSEAS EMPLOYMENT POTENTIAL" (Exhibit 12)

The Brochure "Overseas Employment Potential" (Exhibit 12) is a statement which contains a good number of valid points vis a vis the matter of overseas employment. Indeed, it is that validity that makes it so persuasive. Under "GUARANTEES" is the statement, "We do not guarantee employment. It is illegal to do so..." but therefollows "Once hired by a company, they will guarantee the job before you go overseas". There is the statement under "PROMISES", "We promise to introduce you to American firms or institutions doing business overseas". This has been interpreted to indicate that Foreign Opportunities has special contacts or that documents emanating from Foreign Opportunities will receive special attention. This is fortified by the statements, "Your first step is a well written resume. Under "DECISIONS", "If you make the decision to engage us to help you seek overseas employment..." Under "OUR FUNCTION", "We are not an employment agency but rather a service organisation international in scope". "Your second step is to see that your resume is read by the proper people". One client took from this process that Foreign Opportunities would "open doors"; he would thereby get a 'foot in'.

A brief questionnaire (Exhibit 6B(1)) is filled out. The questionnaire is taken to the Receptionist's desk when completed.

The questionnaire asks among other things "Do you really want to go?" The questionnaire by virtue of its questions, is such as to elicit answers which put the client in a very affirmative frame of mind.

Client is taken into a tape room to listen, generally in a small group, to a 25 minute recording (Transcript - Exhibit 13).

The tape (Exhibit 13) is also a statement full of factual information and valid propositions. It is a statement which in toto is very persuasive that - Foreign Opportunities will play a significant role in placing the client. There is a statement, "We take the talents and skills that are available in this country and endeavour to match them up to the needs of American

Industry doing business overseas". Though there are again disclaimers, e.g. "We are not an employment agency" they are so couched and positioned that they do not dissuade. For example, a statement implied there is a special advantage to the Foreign Opportunities procedures as compared to an employment agency, i.e. "You tell me which man you're going to hire". It is said "The first step is to get the interview---Actually what we do is put your foot in the door". "It would be your decision as to which company to work for". To the question "What if I'm unsatisfied with the results from the first ten companies" the answer is given "Let's suppose a client receives four job offers out of the first ten..." It is also stated "If we feel that...we cannot market your qualifications, we must reserve the right to accept or reject you as a client". The negative aspects of the statement deal with working conditions and not with prospects of employment. Yet one client was persuaded that the presentation was a balanced one.

Client is asked if he or she wants to continue with an interview.

If so, client is given a Rough Draft Resume Form (Exhibit 6B(2)) to fill out, together with a Directions (see last Exhibit) (instruction) sheet. When the form is completed client is asked to bring it to the Receptionist who goes over the form to make sure it is properly made out.

The Rough Draft Resume is put before Shea upon an interview and subject to certain notations made by him, is simply retyped by the secretary to become the final Job Objective Resume. A comment portion is generally extracted from samples in the Directions sheet provided and one sample in particular is repeated in various resumes.

Client is then given a personal interview by Shea who reviews education, work background, job objective and personal history.

Though clients drop out at various stages to and including this point, most who complete the interview emerge very optimistic about chances for employment overseas.

Client pays a deposit of \$30.00 (see Exhibit 6A).

The "Terms of Receipt & Deposit" states "if invited for a final interview this means you have been accepted by Foreign Opportunities."

Client is then given a date that client can call back to see if client is accepted by the Board and is advised that if client is 'accepted' she or he will be asked to make a second appointment, and to bring in \$170.00 balance.

When leaving the office, client is asked to fill out a questionnaire on a newspaper survey (see Exhibit 6B5), which includes the question "Have you found anything in our advertising or presentation to be untrue or deceptive? Yes () No ()".

Client calls back; if he or she has been accepted, a second and final appointment is set up.

If rejected and the client has made a deposit, the deposit is returned to the client (see Exhibit 20(b)).

If accepted the client pays the balance of \$170.00 upon the second interview.

When client comes in again, client is given a paper to read "WHAT WE CANNOT ANSWER" (Exhibit 11), which is basically a disclaimer of any assurance of placement.

When the client goes in on second interview, Shea goes over the Rough Draft Resume with the client. Shea then explains that client will be receiving a package in thirty days a sample of which he shows the client namely: a final resume "JOB OBJECTIVE" (see Exhibit 7) plus 10 envelopes containing that resume addressed to 10 American companies listed on a list 'sheet' with information with respect thereto (see Exhibit 8).

Shea shows an envelope containing a sheet telling the client what to do or not do on an interview (see Exhibit 23).

Shea goes over part of the check-off list (see Exhibit 6B(3)) with the client and it is then given to the client to read, sign and date

Client is then given a copy of the Contract for Services (see Exhibit 6B(4)) and asked to initial and sign it.

This document in paragraphs (A) and (B) sets out the limited, contractual services to be actually provided by Foreign Opportunities, and details acknowledgments of disclaimers including that of paragraph H.

- "A. FOREIGN OPPORTUNITIES AGREES TO PREPARE A RESUME FROM INFORMATION SUBMITTED BY THE UNDERSIGNED CLIENT AND TO PROTECT CLIENT'S PRIVACY.
- B. FOREIGN OPPORTUNITIES AGREES TO MAIL CLIENT 20 COPIES OF HIS RESUME, 10 ENVELOPES, AND 10 ADDRESS LABELS OF OVERSEAS COMPANIES (AS PER CURRENT LIST) WITHIN 30 WORKING DAYS FROM DATE PAID IN FULL. EXCEPTION: MAIL SERVICE PROBLEMS OVER WHICH WE HAVE NO CONTROL.

.....

- H. CLIENT HAS FOUND NOTHING UNTRUE OR DECEPTIVE IN THE ADVERTISING OR PRESENTATION OF FOREIGN OPPORTUNITIES, NOR THE CONTENTS OF THIS CONTRACT WHICH HAS BEEN READ AND UNDERSTOOD BY THE CLIENT

Shea takes a copy of the check-off list and a copy of the contract that the client has signed, puts them in the envelope with the list of things to do, reviewing the material with the client who gets the envelope.

Within the 30 days, the client receives the packet referred to: a resume, a list and 10 envelopes (addressed to the names listed) containing the resumes, which the client then mails. The client thereupon awaits replies.

The replies are few - in the main courteous 'acknowledgments'. A good deal of evidence was placed before the Tribunal demonstrating the lack of success in receipt of favorable or realistic encouraging reply, in attaining an interview, obtaining overseas employment. There was only one instance of the latter.

A significant part of the above recited process was the typing by the secretary on her own of the final resume 'OBJECTIVE' which was sent to the office of a U.S.A. associate - Worldwide Services of Clinton, Connecticut, hereinafter referred to as 'Worldwide'.

Worldwide is the only operating division of MCB International Ltd. of Hong Kong. It is held forth as a research organization. The Tribunal finds that the main 'Research' carried on is the compilation from direct communication (see Exhibits 38, 39, 51B) and published data (see Exhibit 51A) of an extensive list of corporations, mainly U.S. who employ personnel outside the U.S. with the type of jobs sought to be filled.

Worldwide Services communicates with companies all over the world offering to have resumes of qualified individuals sent to them at no charge; as a result, Worldwide Services receives many letters from companies stating their needs. In addition, Worldwide Services compiles information from many outside sources (see e.g. Exhibit 51(a)).

Richard Forsey is the guiding hand in the operations of Worldwide, being the one who developed the procedures followed by Foreign Opportunities and similar agencies and by Worldwide. Associated with Forsey are a number of persons who form a 'review board'. The members of the review board do not act in concert but on an individual consultative basis with Forsey. Under an agreement between Foreign Opportunities and Worldwide, the latter upon the receipt of the 'JOB OBJECTIVE' resume from Cornwall goes through the procedure of matching up clients and jobs listed and mails to the client the packet outlined by Shea in his interview.

The 'licensing' agreement relationship with Foreign Opportunities is such that Worldwide through Forsey monitors and strongly controls the procedures and the oral communication and documents used in conjunction therewith. For its services, Worldwide receives \$70.00 per client.

The Tribunal notes that the Resume submitted to the client for mailing is basically a recap of the Rough Draft Resume (Exhibit 6B(2)) subject to some comment by Shea. It would appear that the main skill brought to bear is the typing by the secretary (receptionist). Yet great stress is placed throughout the procedure on the importance of the resume; with the inference that the Foreign Opportunities had a special expertise which would bring about a product superior to that by the client, one which would attract the attentions of the authority responsible for hiring personnel. The Tribunal is of the opinion that in the case of Lynne Allan, the resume fell far short of what could have been put forward. The resumes of Foreign Opportunities are stereotype.

An allusion in Shea's interview to a screening process by a review board leads a client to believe that his personal situation is placed before a board acting in unison and that a collective judgment is brought to bear so that an affirmative decision indicates a high probability of successful placement. What the client believes is not what happens.

Nor is the 'matching' up process on the selective individual basis which one would expect in the normal course; indeed, it is nowhere near the picture that is painted for the client in the various presentations. It appears that the assignment of the 10 names is so close to being at random, that one can say there was no relation other than that of a 'shotgun' approach.

An example of the haphazard way in which addresses are supplied is an instance where a client was given addresses where American citizenship was an important factor whereas the Application clearly stated the Canadian citizenship of the Client. In another, two clients were to receive the same 10 names, yet each received a separate set of 10 names. There is duplication of mailing lists. There were forwarded names of corporations which had already indicated in replies to others that there were no vacancies for the qualifications put forward. Updating of the compiled lists is not on an organized basis.

The Tribunal is of the opinion that the kind of skills being sought by employers for overseas placement are in the most part those of highly skilled individuals who perform rather unique functions and who are in scarce supply. The Tribunal is of the opinion that the persons who turn to Foreign Opportunities do not fall within this general description and Foreign Opportunities is aware of this. It would be a rare coincidence for the name of a corporation who was seeking a certain skill to appear on the list of a client with that skill. Yet clients were led to believe that there were many jobs of many types including their individual skills and talents.

The Tribunal is of the opinion that the operation of Foreign Opportunities is a cleverly contrived scheme where a good deal is placed before a client up until the time the contract for services is signed. The client comes to a belief that Foreign Opportunities have a special expertise and contacts and an expectation that their participation and assistance will enable him to be placed in an overseas job. Despite all the open disclaimers, and exculpatory phrases, there is a continuous refrain of other phrases that create thi

belief and expectation within the client. Expertise, contact, know-how, assistance, foot in the door, - that is what a client believes he is paying for.

The first interview was such that a client left with a very optimistic feeling about chance for employment overseas. The receipt for \$30.00 refers to an 'acceptance' by Foreign Opportunities which the Tribunal is of the opinion implied that the client has passed one first stage in the process of being hired. One of the most significant parts of the interview procedure is the conveying to the client that his "application" will go before a 'Board' for evaluation and screening. There is a clear inference to be drawn that this is part of the hiring process - that in some way the prospective employer will base his decision on the fact that there has been this initial clearance, and that a resume emanating from this process will receive special consideration. 'Acceptance' meant that a significant step has been taken and a test of some kind had been passed. One client took the acceptance as being an assessment that she was a 'marketable' entity and Foreign Opportunities could place her. There was a clear use of words and manner suggesting that the jobs are out there fighting for such clients to fill them - that the client's future personal decision would be which job to choose.

The Tribunal is of the opinion that the procedures and language used prior to the execution of the contract for services go far beyond indicating that the services to be contracted for and supplied is a resume and 10 envelopes with addresses for mailing.

There is such a wide disparity between what is actually finally contracted for and delivered, and what clients are led to believe and reasonably understand they are to get, that it can be said that vis a vis their expectations, clients receive little that is of any worth.

Stress was placed on behalf of Foreign Opportunities that there were few complaints directly or indirectly made. The Tribunal is of the opinion that this was not because there were no grounds for complaint nor because clients did not feel aggrieved. The clients concluded that they had no contractual rights, did not want to thereby make an admission that they had been gullible, or to let themselves be placed in the light of having failed by reason of personal fault (see Exhibit 23 - Reasons Why We Cannot Give A Guarantee). For all the client knew, everyone else was getting a job; he was not because there was something wrong with him. The client would want to keep his rejection to himself. When a client objectively reread the

documentation, particularly the 'contract for services' and the 'list sheet' with its statement "in the event of a complaint...." he would get a totally different view of the matter.

On behalf of Foreign Opportunities, it was argued that there was no pressure applied and that it is the client who decides that he will proceed. It is true that no 'pressure' in the ordinary sense of the word is applied, and that at several stages, the client is free to leave without obligation. However, the Tribunal is of the opinion that the whole process is so cleverly orchestrated that once a person keen on an overseas job for whatever reason, gets in the stream of the process, there is fostered a pull to complete the process; the client is lured to continue.

For example, in initial instructions from Worldwide, the following expressions are used as a pattern for dealing with clients on the matter of the 'Review' Board, "If they fee we have a damn good chance and I mean damn good, you'll then be invited back in here for your first interview" (Exhibit 14) and "If you are asked in for a final interview, this means everything looks good" (Exhibit 15).

The Tribunal is not considering contractual rights but the protection of a consumer under the Business Practices Act for it is the protection of the consumer which is the total basis of the Act. The disclaimers by the Applicants do not mean that the Applicants can shield themselves from the reasonable beliefs of ordinary people. As stated in Stubbe v. P.F. Collier & Son Ltd. (1977) 74 D.L.R. (3d) 605 at 619, the provisions of the Business Practices Act "must be construed so as to protect not only alert, potential customers, but also those who are not alert, are unsuspicious and credulous", in short who believe the full input of what they are hearing and seeing, without reading or digesting the print - be it fine or otherwise.

The Tribunal is of the opinion that the basic principle that is set out in F.T.C. v. Sterling Drug, Inc. (1963) cited in (1971) 22 D.L.R. (3d) 51 at p. 66 can be adapted. Within the Business Practices Act, the rule of caveat emptor has been replaced

"by a rule which gives to the consumer the right to rely upon representations of fact as the truth. In order best to implement the prophylactic purpose of the statute, it has been consistently held that advertising falls within its proscription not only

when there is proof of actual deception but also when the representations made have a capacity or tendency to deceive, i.e. when there is a likelihood or fair probability that the reader will be misled.....the cardinal factor is the probable effect which the advertiser's handiwork will have upon the eye and mind of the reader."

Having reviewed all the documents and heard the evidence, the Tribunal finds reasonable and probable grounds to believe that the Applicants are engaged in or have engaged in the unfair practices set out in the Notice. Since the events upon which the proposed Order is based the wording of the various steps have changed, but the operation and effect on a client is basically the same.

The Tribunal hereby directs the Registrar to carry out his proposal.

MICHAEL VALENTINE AYTON

EXTENSION OF TIME

IN THE MATTER OF A NOTICE OF PROPOSAL of the Registrar of Motor Vehicle Dealers and Salesmen dated December 17, 1980, to refuse to grant registration as a salesman to Michael Ayton of Toronto

AND IN THE MATTER OF a request for a hearing respecting the Notice of Proposal pursuant to Section 7 of the Motor Vehicle Dealers Act.

Upon reading the request set out in the letter of January 12, 1981, submitted by Michael Ayton, the Applicant herein, the Tribunal hereby extends the time for giving the Notice, under Section 9a(7) of the Ministry of Consumer and Commercial Relations Act.

DATED at Toronto this 19th day of January, 1981.

MICHAEL VALENTINE AYTON

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF MOTOR
VEHICLE DEALERS AND SALESMEN
TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
HERBERT KEARNEY, MEMBER

COUNSEL: MICHAEL AYTON, in person
PETER J. WILEY, representing Respondent

HEARING
DATE: FEBRUARY 9th, 1981

REASONS FOR DECISION AND ORDER

This was an appeal by the Applicant Michael V. Ayton from the proposal of the Respondent Registrar to refuse to register him as a motor vehicle salesman for the reason (set out in the Registrar's Notice of Proposal dated December 17, 1980) "that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty". In support of such proposal to refuse registration the Registrar cited the fact, subsequently proven at this hearing, that the Applicant had been convicted in the Provincial Court upon a charge of having stolen two automobiles (the property of Ontario Chrysler Limited) during June and July 1978.

It appeared from the evidence and is accepted as fact by the Tribunal that in consequence of the conviction the Applicant was sentenced to fifteen months probation (from July 22nd, 1980) and was ordered to make restitution for his crime in the sum of \$4,800.00. It further appeared and is accepted by the Tribunal that such restitution was in fact promptly made. It also appears upon the evidence that the term of the probationary period has at this time about eight months to run.

The Applicant, in a well-presented submission, informed the Tribunal that no other criminal convictions relating to motor vehicles or otherwise had ever been registered against him during the course of his life.

He displayed what impressed the Tribunal as very real and sincere contrition for his crime which, although very serious, being both calculated and premeditated, may have been originally conceived and subsequently effectuated by persons other than himself. He stated that he was within a few days of being 31 years of age and that selling cars was the only thing he did well. It was also evident that he had suffered very considerable punishment collateral and additional to what had been imposed by the Court.

While accepting the Registrar's premise that the past conduct of the Applicant affords some grounds for apprehension that the Applicant may not carry on business in accordance with law and with integrity, the Tribunal feels that this is not certain and he ought possibly to be given a second chance. But in view of the gravity of the crime of which he has been convicted this should not occur until after the completion of his sentence which included the serving of a period of probation. The Tribunal Orders and Directs the Registrar to carry out his Proposal to refuse to grant registration as a motor vehicle salesman to the Applicant at this time. The Tribunal also recommends that the Registrar, at his discretion allow such registration to the Applicant upon such terms as the Registrar sees fit should he receive a further application for the same from the Applicant upon the termination of the period of probation referred to.

ANTONIO BALDASSARRE

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN TO REVOKE
REGISTRATION.

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
JOSEPH HABERBUSCH, MEMBER

COUNSEL: ALAN GOLD, representing Applicant

PETER J. WILEY, representing Respondent

HEARING

DATE: FEBRUARY 11, 1981.

REASONS FOR DECISION AND ORDER

The Tribunal finds that it is not disputed that during the years 1978 and 1979 at the Municipality of Metropolitan Toronto, in the Judicial District of York, the applicant unlawfully did conspire with persons as yet unknown to commit an indictable offence, to wit, by deceit, falsehood or other fraudulent means, namely by the altering of odometers of used automobiles he was offering for sale, defraud automobile dealers in the Metropolitan Toronto area of more than two hundred dollars in monies contrary to the Criminal Code and that on September 3rd, 1980, the applicant, upon a plea of guilty, was convicted of the said offence, and was fined \$2,000.00.

Under The Motor Vehicle Dealers Act by virtue of Section 6 (2), the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if he were an applicant.

Section 5 (1)(b) provides that an applicant is entitled to registration or renewal of registration by the Registrar except where the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and with honesty

The Tribunal finds that the conduct of the applicant as set out in the transcript of evidence, Exhibit 8, is conduct that affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The issue remaining before the Tribunal is the consequences that should follow from such a finding. On behalf of the applicant, it was submitted that there should be a registration subject to conditions. The submission was made on behalf of the applicant because there is on the part of the applicant, an admission of the seriousness of the matter, that he was co-operative and frank with the police, and that he was not, to use an expression, a 'leader' in the matter.

In respect of these items, there is indeed no evidence to the contrary. The further submission is that because of these facts, and the circumstances of the necessity of earning a livelihood and because others have expressed confidence in the applicant, that the ultimate penalty of not being registered should not be applied.

The Tribunal does not agree.

The applicant has been in the business for over 10 years; indeed, it is the only field he has been engaged in. He knew or ought to have known, that odometer tampering is a most serious action vis-a-vis the consumer public, which is helpless in dealings with motor vehicle dealers in this regard. The fact that the public was not dealt with directly is of no consequence. I agree that this was not an issue raised on behalf of the applicant. However, the Tribunal is of the opinion that the action is compounded in its seriousness, for the purchaser public would be dealing with someone who would be completely unaware of the circumstances relating to the vehicle that was being sold to the direct purchaser.

It was a course of action during a period of 2 years; so it was a very deliberate course of action that became in a way part of the ordinary course of the business. In this particular situation, the operator of the business was himself directly involved; his action was taken knowingly, and for direct gain.

That the action should be viewed in the light of only 39 cars does not mitigate the action. If 39 purchasers were to testify as to the advantage that was taken of them, the magnitude of the action would be more apparent. Indeed it is not likely that the total effect of the tampering with the odometers will ever be known. One thing is certain, restitution may be taken to be an impossibility.

Technically, these proceedings commenced with a notice of proposal to refuse registration. As the hearing progressed facts were brought out that required an amendment to the notice of proposal to one of revocation. Subsequently, it appeared

the matter to be considered is an application for renewal. The form of the action by the Registrar has not, as the Tribunal finds, prejudiced the applicant in the presentation of his case on the merits to the Tribunal.

The Tribunal finds a disentitlement to registration by the applicant, and that the applicant should not be registered under the Act.

By virtue of the authority vested in it under The Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his proposal to revoke the registration of Antonio Baldassarre and if an application for renewal is before him to refuse to renew the registration of Antonio Baldassarre.

This decision is the unanimous decision of the Tribunal.

The decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the two Members who concurred.

ANTONIO BALDASSARRE

MEETING TO CONSIDER AN APPLICATION FOR AN ORDER GRANTING A STAY OF THE DECISION AND ORDER OF THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL PENDING THE DISPOSITION OF THE APPEAL TO THE SUPREME COURT.

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD, MEMBER
JOSEPH HABERBUSCH, MEMBER

COUNSEL: DAVID COLE representing Applicant
PETER J. WILEY representing Respondent

REASONS FOR RULING

The application is made pursuant to Section 7, subsection 9 of The Motor Vehicle Dealers Act which provides:

"Notwithstanding that a registrant appeals from an Order of the Tribunal under Section 9b of The Ministry of Consumer and Commercial Relations Act, the order takes effect immediately, but the Tribunal may grant a stay until disposition of the Appeal."

As has been submitted, the provision in The Motor Vehicle Dealers Act comes within the exception of section 25 of the Statutory Powers Procedures Act which provides:

"Unless it is expressly provided to the contrary in The Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders."

The legislature has provided contrary to the Statutory Powers Procedure Act; the legislature has so indicated to the Tribunal that the Tribunal must use its discretion and to rule on each specific instance coming before it.

The legislature did not see fit to set out any guidelines as the legislature did, for example, in applications dealing with a request for an extension of time by the Tribunal. Therein certain principles by which the application should be dealt with are set out. The Tribunal must determine its own guidelines in dealing with an application for a stay.

In this instance, the Notice of Appeal sets out two basic grounds for appeal and the Tribunal addresses itself to the two grounds.

The first is in relationship to the decision of the Tribunal in the Hearing - that it was wrong. There is always the possibility that the Court of Appeal would set aside the decision of the Tribunal. However, in dealing with the present matter in reading the reasons for decision and order, the Tribunal was not called upon to interpret a section for the first time, nor to make a ruling in respect of which there was doubt. The matter has been dealt with fairly recently in the Herman Motor Sales Inc., appeal. There is really no basis upon which the Tribunal can find that there is that kind of doubt which requires that the consequences of a decision await the determination of the appeal.

The second ground referred to generally in paragraphs 2, 3 and 4 of the Notice of Appeal basis relate to the consequences of the decision of the Tribunal. Those consequences inevitably flow from any negative decision by the Tribunal, so that the legislature must be taken to have been cognizant of such fact when it gave the Tribunal discretion in the matter. By and large any negative decision would have harsh consequences.

One of the alternatives available to the Tribunal in its earlier decision was to impose a suspension. If that is the case, then should the Court of Appeal set aside the Tribunal's decision with respect to the excessiveness of the penalty and the consequences thereof, the intervening period may be taken as equivalent to a suspension. Such suspension too would have serious consequences, and there is no doubt that the consequences would be very serious.

The Tribunal is bound to comment on the affidavits and testimony which have been brought forward as a basis upon which the Tribunal might take its action. It is commendable that members of the industry would come forward and express their confidence in the applicant. However, they are in a position to protect themselves vis-a-vis the applicant to a greater degree than the public at large, and they by and large have been acting and continue to act as sellers and not as buyers of vehicles.

Mr. Schoen in particular has expressed his confidence in the applicant and his willingness to continue an arrangement with the applicant. However, the Tribunal notes that the arrangement is such as does not enable Mr. Schoen to give that kind of supervision which in the interest of the consuming public there should be. There are occasions upon which

vehicles involved in transactions from purchase to reconditioning to sale do not come within the purview of Mr. Schoen.

Under the circumstances outlined, the Tribunal denies the application.

The ruling and reasons therefor were orally given at the conclusion of the meeting by the Chairman in the presence of the two members who concurred.

Released: April 2, 1981

ANTONIO BALDASSARRE

MEETING TO CONSIDER AN APPLICATION FOR AN ORDER GRANTING A STAY OF THE DECISION AND ORDER OF THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL PENDING THE DISPOSITION OF THE APPEAL TO THE SUPREME COURT.

OBJECTION TO COMPOSITION OF TRIBUNAL

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD, MEMBER
JOSEPH HABERBUSCH, MEMBER

COUNSEL: DAVID COLE representing Applicant
PETER J. WILEY representing Respondent

REASONS FOR RULING ON OBJECTION

Counsel, on behalf of the applicant for the Order granting a Stay, has objected to the composition of the Tribunal hearing and application. The 'panel' of the Tribunal which held the hearing dealing with the Notice of Proposal was made up of John Yaremko, Chairman, and Helen Morningstar and Joseph Habermusch, Members. At the conclusion of the hearing, counsel for the applicant moved for a Stay of the Order which was not granted.

Counsel for the applicant submits that the 'panel' of the Tribunal hearing the application for this Stay should be a complete new one; that is, members other than those who held the hearing. Counsel for the Registrar has taken the position that the panel should be the same panel as heard the hearing. He is prepared to have one member (presumably the Chairman) hear it alone. It would appear to be obvious that a consent to one panel member (the Chairman) hearing the matter would go counter to the position taken by counsel for the applicant who maintains that the application should be dealt with by someone completely new.

The application for a Stay is made pursuant to section 7 subsection 9 of The Motor Vehicle Dealers Act which states:

"Notwithstanding that a registrant appeals from an Order of the Tribunal under section 9B of The Ministry of Consumer and Commercial Relations Act, the order takes effect immediately, but the Tribunal may grant a stay until disposition of the Appeal."

There is nothing within The Act apart from the language used in this subsection as to what is meant or intended by the words "The Tribunal". That phrase is the phrase which is used throughout all of The Act. Although, I have used the word "panel" as a term of art in describing the makeup of the Tribunal which held the hearing and the makeup of the Tribunal today, such language does not in fact appear. In the Ministry Act which establishes the Tribunal, the only provision relating to its makeup at a hearing appears to be within section 7, subsection 6 which reads:

"Subject to subsection 7, three members of the Tribunal, one of whom shall be the Chairman or Vice-Chairman constitute a quorum and may exercise all of the powers of the Tribunal notwithstanding any vacancy in the membership."

It would appear then that the only direction is in respect of a quorum and not of its membership. Although it is not a matter in point, with respect to procedural matters it may be that the quorum is not necessary. In respect of an application for a Stay, there is a reference to the Tribunal, and it is clear that section 7, subsection 9 of The Motor Vehicle Dealers Act deals with the power of the Tribunal.

A continuation by the Tribunal as it is constituted today does not meet the position of either counsel. The Tribunal must, of necessity, rule upon procedure to be followed by it. For the record, Mrs. Morningstar is away and will not be available for approximately another month. There could be circumstances under which a member of the Tribunal which had held a hearing could be absent for a considerable period of time. To follow the course of action generally as proposed by counsel for the Registrar in this specific matter of an application for a Stay could cause some difficulty in the scheduling of matters coming before the Tribunal.

The restriction proposed by counsel for the applicant might also hamper the functioning of the Tribunal. It is the opinion of the Tribunal that the matter of an application for a Stay is a matter which is apart from a holding of the hearing and the rendering of a decision with respect thereto.

As has been demonstrated by the filing of the exhibits in this application, material which was before the Tribunal in the course of the hearing is relevant material in consideration of an application for a Stay. Such filing has been the course of action in similar applications heretofor.

Counsel for the Registrar has referred to the present application as being an appeal from a decision made by a panel of the Tribunal at the close of the hearing. It is clear that two of the members of this panel will be cognizant of the motion made at that time and of the decision that was made at that time. There is no provision under The Act for an appeal within the Tribunal of a ruling of that kind. The Tribunal in granting the appointment for the meeting this morning was of the opinion that it was an application separate and apart from the hearing dealing with the Notice of Proposal. It has been clearly established that following the hearing by the Tribunal, once the decision and order is made, it is functus.

It is the opinion of the Tribunal that it is properly constituted to deal with the application which has been made today.

The ruling and reasons therefor were orally given by the Chairman at the outset of the hearing in the presence of the two members who concurred.

CHRISTOPHER BLENCOWE

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN TO
REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
HERBERT KEARNEY, MEMBER

COUNSEL: CHRISTOPHER BLENCOWE, in person
PETER J. WILEY, representing the Respondent

HEARING

DATE: February 9, 1981

REASONS FOR DECISION AND ORDER

The Registrar proposed to refuse registration as a motor vehicle salesman of the Applicant, Christopher Blencowe upon the following grounds:

1. In my opinion, the Applicant is disentitled to registration under Section 5 of the Act in that his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and with honesty.
2. In my opinion, the Applicant, when he was a registrant, was in breach of a term and condition of his registration, namely that he had been convicted of an offence under The Criminal Code of Canada that was relevant to his fitness to act as a registrant.

The Registrar's opinion was based upon the following facts (which, upon the evidence before it, the Tribunal accepts):

1. The Applicant has a past criminal record which includes convictions for fraud and false pretences including a period of incarceration.
2. The Applicant was convicted on June 9, 1980, in the criminal court on one count of fraud over which involved the alteration of the odometer on a vehicle being offered for sale, to reflect a lower mileage than was actually on the vehicle.

3. The applicant was involved with other parties in the purchase and sale of vehicles in which the odometers had been altered to reflect lower mileage than were actually on the vehicles.

Evidence was presented at the hearing that the Applicant has for some years suffered from serious personal problems including excessive use of alcohol and barbituates and that his past misconduct seems to have stemmed from these, rather than from any basically criminal nature. To this effect we heard testimony from two clergymen and that of his recently-acquired wife. This latter lady impressed us as an honest person and as one who sincerely desired to exercise a steadying influence upon the Applicant and might well succeed in so doing. The witnesses, including the Applicant himself, assured the Tribunal that the use of alcohol and barbituates had been discontinued some months ago. The Tribunal was urged to give the Applicant one more chance to prove an ability to reform his ways. Conscious of the public interest, the Tribunal received these submissions with trepidation. However, in the course of its difficult deliberations the Tribunal received considerable assistance from the submissions and from the attitude of Counsel for the Registrar and has concluded that the instant case may be a proper one for the exercise of some degree of leniency provided the same be accompanied by strict surveillance and limited to exacting terms.

The Tribunal therefore Directs the Registrar to permit the Applicant to receive registration for the balance of the present year but only upon the following terms and conditions which we trust will be sufficiently stringent to protect the public interest, namely.

- (1) That Christopher Blencowe's registration shall be restricted to employment only with a motor vehicle dealer approved by the Registrar of Motor Vehicle Dealers and Salesmen and that no transfer of employment or registration shall be undertaken by Christopher Blencowe without prior notice in writing to and with the approval of the Registrar whose approval shall not be unreasonably withheld; and

- (2) That Christopher Blencowe shall not contravene any of the provisions of the Motor Vehicle Dealers Act, Revised Statutes of Ontario 1970, Chapter 475, as amended or the regulations thereunder, or commit an offence under the Criminal Code of Canada, or under any law in any jurisdiction which in the opinion of the Tribunal is relevant to his fitness for registration under the said Motor Vehicle Dealers Act.

DONALD CAMERON

APPEAL FROM PROPOSAL OF REGISTRAR OF MOTOR VEHICLE
DEALERS AND SALESMEN
TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
P. WILLISON, MEMBER

COUNSEL: DEREK ROSE representing the Applicant

PETER J. WILEY representing the Respondent

HEARING

DATE: April 13, 1981

REASONS FOR DECISION AND ORDER

One of the functions of this Tribunal, which is an Administrative Tribunal, is to help maintain the standards of the various industries which come within the ambit of its jurisdiction. Mr. Cameron's case is one in which we would be extremely reluctant to appear to lower the standards of the Motor Vehicle Dealers Sales Industry by failing to extinguish, once and for all the registration of a man who appears before us convicted of a serious crime committed in the course of his activities in the very industry in respect of which we are meant to be exercising some regulative jurisdiction.

We find it exceedingly difficult to give serious credence to the assertion that the Registrar's letter of December 8th (Exhibit 11) never came to Mr. Cedilot's attention.

On the other hand, the Tribunal cannot fail to give some consideration to its earlier decision in the related case of Michael Valentine Ayton, which was in respect to a matter the facts of which were very much interconnected with those before us now.

The Tribunal accepts as a fact that the Applicant, Donald Cameron, was convicted on September 8th last upon the charge set out in Exhibits 7 and 8, to wit, on the charge that he was in possession of two automobiles obtained by crime on or during the months of June or July 1979 contrary to the Criminal Code, and we find that he was sentenced to a term of probation one year (vis-a-vis from September 8, 1980 to September 8, 1981) as well as to make restitution to the victim or victims of his crime in the sum of \$900.00. We find that approxi-

mately half of that monetary penalty remains presently unpaid.

The Tribunal notes that the scope of the Applicant's operations has heretofore been small and has taken that into consideration when assessing the possible damage to the public which might flow from a continued renewal or a conditioned conditional renewal of his registration.

It is the Tribunal's decision that the Applicant, notwithstanding the generally dubious impression he has made here, ought not to be precluded from the means of earning his livelihood, so long as he can demonstrate on an ongoing and continuous basis an ability to operate his affairs not only within the limits of the law, but to do so strictly to the satisfaction of the Registrar of Motor Vehicle Dealers and Salesmen.

The Tribunal therefore directs the Registrar, upon receipt by him of proof that the full amount of the restitution and reparation referred to in the Probation Order of September 8, 1980, has been paid in full to the aggrieved persons thereunto entitled, shall thereupon allow the Applicant, the said Donald Arthur Cameron, a temporary and conditional renewal of his registration as a Motor Vehicle Dealer Salesman under the Act, such renewal to be subject to strict conditions as to time and other terms (including the further renewal thereof) as the Registrar should consider proper in his discretion. Without restricting the generality of the foregoing, the Tribunal Orders and Directs that such conditional registration shall be subject to review by the Registrar every three months for the first year (unless terminated earlier) and shall apply only for so long as the Applicant is employed by Roger Cedilot, carrying on business as LaSalle Auto Sales.

The decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the two Members who concurred.

GERTH DAUB

APPEAL FROM PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE REGISTRATION AS A MOTOR VEHICLE SALESMAN

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
DAVID A. BAKER, MEMBER

COUNSEL: GERTH DAUB in person

PETER J. WILEY representing the Respondent

HEARING DATE: July 27, 1981

REASONS FOR DECISION AND ORDER

This is an application by Gerth Daub for registration as a motor vehicle salesman to be in the employment of Earl Schedewitz Automobiles Ltd.

The Registrar has considered the application directing his attention to section 5 of the Motor Vehicle Dealers Act, which states in part:

"5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty".

The Registrar has come to a decision that the Applicant is disentitled to registration and set out the reasons in the Notice of Proposal dated the 20th day of May, 1981:

- "1. On March 18, 1981 the Applicant was convicted of an offence under Section 239(1)(d) of The Income Tax Act and a fine was imposed on him by way of penalty.

2. The circumstances of the conviction related to the Applicant's conduct while employed as sales manager by Orr Automobiles Limited, Kitchener.
3. The conviction and circumstances on which it was based affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.
4. As a result of the conviction the Applicant has suffered financial burdens and I am of the opinion that having regard to his financial position the Applicant also cannot reasonably be expected to be financially responsible in the conduct of his business."

Financial responsibility was not pursued on behalf of the Registrar, so the Tribunal's decision is related to the matters set out in paragraphs 1, 2 and 3.

The circumstances of the conviction are set out in the transcript of the proceedings (Exhibit 7).

It is to be noted that the car sales transactions involved were some 105 over a period of 4 years which averages out to 25 per year and to 1 per every two weeks of the year. Particulars of two instances indicate that the transactions were part of what may be called a scheme; and though it may be one that 'grew' it is one that became extensive and sophisticated involving either innocently or otherwise other persons for the carrying out thereof. The income from these transactions was undeclared under the Income Tax Act and accordingly conviction was registered.

Evasion of income taxes is reprehensible in itself. Here we have a situation where that is compounded by the nature of and the method whereby that income was obtained. There would appear to be four varying activities; three related to undeclared income and one related to an unjustified claim. There is undeclared interest on two unregistered loans. Then we have undeclared income from the sales transactions which involved actions and an attitude which go beyond the mere nondeclaration of income; similarly with respect to funds which were obtained in respect of undercoating and safety checks. And then there is the further item of a claim for something to which there was no entitlement.

These activities must be viewed in the light of the fact that the Legislature has set out in a specific Act that a person who wishes to participate in this particular kind of business must be such that past conduct will not afford reasonable grounds for belief that he will not carry on business in accordance with law and (I underline) with integrity and honesty. The activities pursued by the Applicant involved a relationship with respect to the employer and perhaps not as directly, with members of the public - the consumers. It is difficult to determine clearly that the public has in fact been defrauded. The deviousness of the method is such as to make the finding in this regard a difficult one. However, a member of the public can well query if a Registrant has a direct relationship of trust, and that trust has not been completely adhered to, what would the situation be where the relationship is one with members of the public who in the large degree would be strangers. The Tribunal must make a finding as to whether there is basis for the Registrar's belief, based on reasonable grounds, that the Applicant will not carry on business in accordance with law and with integrity and honesty, or any part thereof.

The Tribunal has heard from a number of members of the public, friends, and individuals who have been in business dealings with the Applicant, who have spoken very highly in his regard. The Tribunal acknowledges that this is a trait of human nature which has been evident throughout the years when persons come forward to stand at the side of and be of assistance to someone who has done action which has been wrong and of whom they would like to speak in favour being aware of the circumstances to a degree and the consequences that have followed. The full circumstances have emerged to a greater degree during the course of this hearing.

The obligation falls however upon the Registrar and in a consideration of the Registrar's proposal on the Tribunal to view the situation from the point of view of the public at large, that in a way is unable to attend and give its opinion. In this regard, there would be some 105 who were directly affected by the action; it may be that some of them will have been very content with their transactions. However, the legislation is such that the Legislature has seen fit to set down in statute form that conduct which one would expect in the ordinary course of business must - certainly in the course of a

regulated business - be of a very high standard. It is not merely a case whether the Applicant has repented, or whether he has suffered sufficiently; it is a question of what on a review of the whole matter the obligation of the Registrar should be in his judgment under the circumstances.

The Tribunal is of the opinion that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. It comes within the exception to the entitlement and the Tribunal directs the Registrar to carry out his proposal.

The Tribunal notes again, and it was touched upon by counsel for the Registrar, that under section 21 of the Act, "A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed." The Applicant has had experience, and has demonstrated an ability to perform skills and duties within the motor vehicle industry. It may be that he may see fit when he is of the opinion that section 21 may be resorted to to make a further application.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

LUCIEN GOULET AND MOTOR SALES LIMITED AND
LUCIEN GOULET

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
W.W. EVANS, MEMBER
ROBERT S. BANNERMAN, MEMBER

COUNSEL: LUCIEN GOULET, in person and as Agent for the
applicant Lucien Goulet Motor Sales Limited

PETER J. WILEY, representing Respondent

HEARING

DATE: January 26, 1981

REASONS FOR DECISION AND ORDER

Lucien Goulet Motor Sales Limited since the 16th day of February, 1970 has been a registered motor vehicle dealer carrying on business at 3064 Pitt Street, Cornwall. Lucien Goulet has since that date been registered as a salesman to the Corporation. The registrations are continuations of registrations by Goulet Body Shop and Lucien Goulet as a salesman therefor since on or about the 27th day of August 1965.

Lucien Goulet has at all material times been President and director of Lucien Goulet Motor Sales Limited.

On the 23rd of September, 1980, the Registrar of Motor Vehicle Dealers and Salesmen under the Motor Vehicle Dealers Act issued a notice of proposal to revoke the registration of Lucien Goulet Motor Sales Limited and Lucien Goulet, with respect to Lucien Goulet Motor Sales Limited for the reason that the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, and with respect to Lucien Goulet that his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and integrity and honesty. The allegations were based on the fact that during the period from February 15th, 1979 to August 15th, 1979, the Company purchased and sold 13 motor vehicles which had odometers that had been tampered with so as to show reduced mileage.

The details respecting the tampering are set out in Exhibit 9 being a summary upon which evidence was placed before a Provincial Court. In respect of four of the vehicles, cars 1, 2, 7, and 12, on a plea of guilty as set out in Exhibit 8, Lucien Goulet was convicted that "did by deceit, falsehood or other fraudulent means, namely of the altering of odometers and the misrepresenting of histories and conditions of used automobiles.....offering for sale, defraud the public of more than two hundred dollars in monies. Contrary to the Criminal Code Section 338(1)." The reduction in respect of the four vehicles totalled some 83,560 miles; the differences between purchase and sale prices totalled \$4,145.00.

In respect of the remaining nine vehicles set out in Exhibit 9 and in respect of 80 other vehicles, one Robert Raymond on a plea of guilty was convicted as set out in Exhibit 10 of similar fraud contrary to the Criminal Code Section 338(1). Raymond was at the time of the purchase and sale of the nine vehicles referred to, registered as a salesman to Lucien Goulet Motor Sales Limited. Robert Raymond had been registered as a motor vehicle dealer but had gone into bankruptcy in or about 1978. He then entered the employ of Lucien Goulet Motor Sales Limited.

There was an arrangement whereby Raymond was involved in the main in the wholesale purchase and sale of used cars on behalf of Lucien Goulet Motor Sales Limited. In respect of a vehicle purchased and sold by Raymond, Lucien Goulet Motor Sales Limited recived a payment of \$100.00, the remainder of the profit going to Raymond. In an instance where the purchase was by Raymond and the sale was by Lucien Goulet Motor Sales Limited, Lucien Goulet Motor Sales Limited paid to Raymond the sume of \$200.00 and kept the balance of the difference as a profit. The same arrangement appears to have been entered into with one A. Boudrias. Boudrias acted in the purchase of cars 1 and 2 in Exhibit 9, and Raymond acted in the purchase of cars 7 and 12 in Exhibit 9.

Lucien Goulet has disclaimed all knowledge of the tampering. The procedure followed by Lucien Goulet in writing up the sales agreements, in respect of the four motor vehicles as contained in Exhibits 11, 12, 13 and 14, and was to refer only to a stock sheet prepared from time to time by his secretary for the price paid. No reference was made to the Agreement of Purchase which was available within the records of the Corporation and which set out the mileage at the time of the purchase.

The Tribunal notes that in the preparation of the Bills of Sale, Lucien Goulet did not in all instances comply strictly with the requirements of the Act. His explanation was that he was likely too busy.

The Tribunal finds that the conduct of Lucien Goulet in the operation of the business with respect to the details of purchases and sales in respect of which Raymond and Boudrias were involved, and in particular with reference to the odometer meters was completely irresponsible. Indeed it was not different to turning a blind eye to the possibility of wrongdoing, and creating a situation in which he ought to have known what could occur.

Lucien Goulet maintains that his operation has changed so that there would be no possibility of such an occurrence again.

The Tribunal finds that he has not demonstrated the change to a significant degree. Indeed the arrangements under which the tampering occurred have continued and Raymond is still a salesman of Goulet Motor Sales Limited. The Tribunal finds the continuing of this relationship incomprehensible, and an indication that there has not been that drastic clear cut change that one would expect under the circumstances. Continuation has been to safeguard a debt situation that exists in the operation of the business.

The Tribunal reiterates its often expounded view that tampering with odometers is a most serious offence against a vulnerable public that cannot protect itself except upon reliance upon compliance with the law of those with which it deals, and upon the integrity and honesty of such persons. The public is entitled to rely upon registration under the Act as an indication that the law will be complied with and that the business will be conducted with integrity and honesty.

The Tribunal finds that the past conduct of Lucien Goulet affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. The Tribunal further finds that Lucien Goulet as officer and director of Lucien Goulet Motor Sales Limited affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.

The Tribunal is mindful of the fact that the penalty of revocation is a severe one, but it is of the opinion that under all of the circumstances relating to the conduct of this business and its continuance in its present form, it is one that should be imposed

The Tribunal is mindful of the extent of the operation of the business and of its significance. In this regard, it is mindful of the provision of section 21 of The Motor Vehicle Dealers Act which sets forth that a further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

Accordingly, by virtue of the authority vested in it under The Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his proposal to revoke the registration of Lucien Goulet Motor Sales Limited and Lucien Goulet.

. The decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the two Members who concurred.

DONALD NEIL MacMILLAN

APPEAL FROM PROPOSAL OF REGISTRAR OF MOTOR VEHICLE
DEALERS AND SALESMEN
TO REFUSE TO REGISTER THE APPLICANT AS A MOTOR
VEHICLE DEALER

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
ROBERT J. RUMBLE, MEMBER

COUNSEL: DOUGLAS ROLLO representing the Applicant
PETER J. WILEY representing the Respondent

HEARING
DATE: April 29, 1981

REASONS FOR DECISION AND ORDER

The Applicant, Donald Neil MacMillan, applied on or about the 5th of February, 1981 for registration under the Act as a motor vehicle dealer.

On the 27th of February, 1981 the Registrar of Motor Vehicle Dealers and Salesmen issued a Proposal to refuse the registration for the reasons set out in Exhibit 4, namely, because of the Registrar's opinion that the Applicant

"...is disentitled to registration under Section 5 of the Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty."

and also of his opinion

"that there is not new or other evidence or that it is clear that material circumstances have changed since my (the Registrar's) refusal to grant registration to the Applicant on the 1st day of October, 1980."

As a basis for his opinion, the Registrar relied on certain facts set out in a Notice of Proposal dated the 26th of May, 1980 filed as Exhibit 6, containing some 13 paragraphs, which was the basis of a refusal of an earlier application. The basis of which refusal was the opinion of the Registrar:

"1. Having regard to his financial position, the

APPLICANT cannot reasonably be expected to be financially responsible in the conduct of his business.

2. The past conduct of the APPLICANT affords reasonable grounds for belief that the APPLICANT will not carry on business in accordance with law and with integrity and honesty."

That Notice of Proposal of the 26th of May, 1980 was dealt with by the Tribunal on or about the 24th day of September, 1980 and a Decision was issued, now filed as Exhibit 7, which stated inter alia:

"The Tribunal accepts as proven the facts set out in the Respondent's Notice of Proposal in paragraphs 1 to 13, inclusive.

Upon the basis of these the Tribunal finds that, having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business and also that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty."

This Tribunal notes that the Decision was based on two provisions of the Statute and that the finding is made in a general way. The Tribunal directed the Registrar at that time to carry out his Proposal to refuse.

Paragraphs 9, 10 and 11 of Exhibit 6 refer to certain Judgements obtained by one Harold Briggs against the Applicant on the 28th day of April, 1977 and against Don MacMillan Limited on the 2nd of April, 1980 which were unpaid at the issuance of the earlier Notice of Proposal and at the time of the earlier Tribunal hearing. Harold Briggs was on or about the 29th day of January, 1981 paid his claim by the Applicant. The present application for registration then followed.

The Tribunal notes that the Brigg's claim was based on an allegation that a motor vehicle, the odometer of which recorded some 52,000 miles had in fact been driven in excess of 93,000 miles. The Applicant states that the claim was uncontested on the advice of his lawyer.

The statement of claim in the second Judgement, paragraph 11, reads as follows:

"The Plaintiff states that the Defendant's representative falsely represented to him or misled him to believe that the said Dodge Van had been driven no more than 52,740 miles when the actual mileage in fact exceeded 93,000 miles"

That statement, by reason of the fact that the claim was not contested, went unchallenged. The Applicant has testified herein that he was unaware that the odometer recording was incorrect. The applicant admitted that payment to Briggs was made because he thought it would help at this Tribunal hearing. For the record, the Tribunal finds that the applicant is of considerable means.

The Applicant has submitted that the payment of the claim is a material circumstance that has changed, the fact of nonpayment of the claim being set out in the earlier Notice of Proposal. The Applicant has submitted that the reasons set out in paragraph 13 of the Notice of Proposal reciting the fact that certain charges have been laid against the Applicant, should not be the basis for the refusal for registration.

The Tribunal has reviewed the history of the operations of the Applicant and the course of his registration under the Act which, as related in Exhibit 6, have not been disputed. Going back to 1968, the Applicant has been in serious breach of the Motor Vehicle Dealer's Act in a number of instances.

In 1968 the Applicant's conduct led to a refusal of the registration by the Registrar. The Director in reviewing the Decision stated:

"I am satisfied that the Registrar was duty bound to deny Donald Neil MacMillan registration as a used car dealer."

also stated:

"Mr. MacMillan should be given an opportunity to rehabilitate himself consistent with our duty to consider the public's right to protection"

and recommended that registration be granted subject to certain terms and conditions.

In 1971 and 1973, terms and conditions were applied to the Applicant's then registration.

In 1976, the Registrar proposed to revoke

registration upon certain allegations which, in addition to certain other contraventions alleged, included the allegation....

"that the registrants have been involved over a substantial period of time and in a substantial number of cases with tampering with or the alteration of odometers, thereby contravening the requirements of Section 19 (1) of Ontario Regulation 98/71 made under The Motor Vehicle Dealers Act, R.S.O. 1970, c. 475, as amended."

Upon consent an Order of Suspension of 10 months, with certain terms and conditions was issued by the Tribunal upon a hearing.

The Tribunal is of the view that the Applicant in all these proceedings has been treated most fairly.

In 1979 a conviction for fraud relating to those alterations of odometers was registered.

The Tribunal is of the opinion that in the conduct of this hearing, it is entitled to make the above review, for the basic determination is whether entitlement to registration comes within the exception of the past conduct provision.

The Motor Vehicle Dealers Act was passed for the protection of the public. A basic provision is that the business regulated be carried on in accordance with law, with honesty and with integrity.

The Tribunal is of the opinion that the past conduct of the Applicant based on the facts set out in the material relating to paragraphs 1 - 12 is such that it affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

There is no new or other evidence placed before the Tribunal. There has not been that change in material circumstance upon which an entitlement to registration, which the Tribunal found the Applicant did not have in September 1980, should now be affirmed as an entitlement by the Tribunal at this time.

Relevant as the payment of the claim may be to the question of financial responsibility, the Tribunal finds that the conduct of the Applicant in his dealing with the public, as represented by Briggs, has not in reality changed.

The Tribunal believes such conduct goes counter to the broad interpretation which must be given to integrity.

In the light of these findings of the Tribunal, there is no necessity for the Tribunal to rule upon the relevancy of the pending charges, either by themselves or in conjunction with the remainder of the findings of the Tribunal.

The Tribunal finds that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, and finds further, that since the previous Decision there is no new or other evidence, nor is it clear that material circumstances have changed as would warrant the entitlement of the Applicant to be affirmed.

The Tribunal is also of the opinion that the conduct of the Applicant and the consideration which he has been granted during his course of registration under the Act, do not warrant the alternatives either of registration subject to terms and conditions or of registration as a salesman, put forward very ably by counsel.

The Tribunal by virtue of the authority vested in it under the Motor Vehicle Dealers Act, Section 7, directs the Registrar to carry out his Proposal to refuse to register the Applicant.

The decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the two Members who concurred.

IN THE MATTER OF THE MOTOR VEHICLE DEALERS ACT
REVISED STATUTES OF ONTARIO, CHAPTER 475, AS AMENDED

AND IN THE MATTER OF
RICHARD McNEILLY

Registrant Herein

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

ORDER

UPON the application to the Tribunal by the Respondent for issuance of the consent order of the Tribunal pursuant to Section 4 of the Statutory Powers Procedure Act, 1971 and having read the consent of the parties hereto dated the 14th day of July, 1981 to the disposition of the proceedings without a hearing as evidenced by the execution thereof by the Respondent and by counsel for the Registrant filed and attached hereto;

WHEREAS the Registrar of Motor Vehicle Dealers and Salesmen issued a Notice of Proposal to revoke the registration of the Registrant pursuant to the provisions of Section 7 of the Motor Vehicle Dealers Act;

AND WHEREAS the Registrant by his counsel has by written letter dated December 18, 1980 duly required a hearing by the Commercial Registration Appeal Tribunal (hereinafter called "The Tribunal") in accordance with Section 7 of the Act;

AND WHEREAS the Tribunal by its Notice of Hearing dated March 6, 1981, scheduled a hearing in the above noted matter to take place at the Tribunal Hearing Room, 10th Floor, 1 St. Clair Avenue West, Toronto, Ontario on Wednesday, June 3, 1981 and so from day to day until the hearing is concluded;

AND WHEREAS the Tribunal upon request for an adjournment by the Registrant and concurrence of counsel for the Registrar adjourned the hearing of June 3rd, 1981 at 9:30 a.m.;

AND WHEREAS the parties herein through their counsel have, among other things and notwithstanding the provisions of Section 7 of the Act filed with the Tribunal a copy of the

Consent of the parties hereto dated July 14th and June 23rd respectively to dispose of the proceedings without a hearing as evidenced by the execution thereof by the Respondent and by counsel for the Applicant filed and attached hereto;

NOW THEREFORE this Tribunal doth order that this matter be and the same is hereby disposed of without a hearing on the basis that the terms and conditions set forth in the said consent and expressly thereby accepted and agreed to by counsel for the Applicant should be in force and apply to them in accordance with such consent.

DATED at TORONTO, Ontario this 21st day of July, 1981.

ROBERT C. RAYMOND

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF MOTOR
VEHICLE DEALERS AND SALESMEN TO REVOKE
REGISTRATION.

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
DOUGLAS LEGGAT, MEMBER

COUNSEL: DONALD BEARDALL, Counsel for Applicant
PETER J. WILEY, Counsel for Respondent

HEARING

DATE: March 24, 1981

REASONS FOR DECISION AND ORDER

The Tribunal feels very considerable sympathy for Mr. Raymond in his unfortunate position, and has no desire to add punishment to what has been imposed by the Court in consequence of his criminal conviction even if that were part of its function. He has demonstrated a contrite in candid demeanor at this hearing which impresses us favourably. Nevertheless, he appears here as a man convicted of a serious crime relating to fraud against the public in the course of his business activities in the motor sales industry. He remains on probation, such probation being a part of the Court's sentence.

The Tribunal finds as a fact that Mr. Raymond did, on a substantial number of occasions, tamper with odometers and takes notice of his conviction in connection therewith as evidenced by the Certificate of Conviction (Exhibit #6). The Tribunal is obliged to agree with the reasons set forth by the Registrar of Motor Vehicles in support of this proposal, namely that the past conduct of this applicant affords reasonable grounds for belief that he will not carry on business in accordance with law with integrity and honesty.

Accordingly, the Tribunal orders and directs that the said proposal be put into effect by the Registrar and carried out and that the registration of Robert C. Raymond as a Motor Vehicle Salesman be revoked (or not renewed, as the case may be).

SPRINGVILLE AUTO SALES LTD.
RALPH EGGLESTON

APPEAL FROM PROPOSAL OF REGISTRAR OF MOTOR VEHICLE
DEALERS AND SALESMEN
TO REFUSE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
WILLIAM J. SHANAHAN, MEMBER

COUNSEL: NO ONE APPEARING for the Applicant
PETER J. WILEY for the Respondent

HEARING

DATE: April 14, 1981

REASONS FOR DECISION AND ORDER

Springville Auto Sales Ltd. herein referred to as Springville was until the 31st of December, 1980, a registered Motor Vehicle Dealer carrying on business at 150 Lansdowne St. E., Peterborough, Ontario. Ralph Eggleston (herein referred to as Eggleston) was at all times the President of the Company; he is also the only shareholder on record. He appeared at all relevant times to be in charge of and the manager of the business.

Ralph Eggleston was until the 31st of December 1980, a registered motor vehicle salesman, and was registered to Springville Automotive Sales Ltd. Springville and Eggleston are the 'registrants' and applicants for the hearing.

On the 17th of April 1980, Eggleston met with the Registrar, as a result of an investigation made on or about the 4th of February 1980 which indicated great deficiencies in the record keeping of Springville. By letter dated April 30th, the Registrar advised Eggleston, c/o Springville, of the contraventions with a warning that should the next inspection reveal discrepancies, there would be no hesitancy in recommending that prosecution action be taken against the dealership.

On the 9th day of December, 1980, the Registrar issued a Notice of Proposal addressed to the Applicants "to revoke the registration of the registrants" for the reasons stated therein.

Upon failure of Springville to apply for renewal of the registration, the Registrar under the Motor Vehicle Dealers Act (herein referred to as Registrar) by letter of January 21, 1981, addressed to Springville Auto Sales Ltd. advised of the termination of registration: "of your dealership and sales staff...effective December 31st, 1980."

The Tribunal finds that the Registrants in the City of Peterborough, during a 14 month period commencing May 1979 and ending June 1980, did commit the offence of failing to show the recorded odometer readings on sales orders contrary to Section 16(3)(g) of Ontario Regulation 98/71 made under the Motor Vehicle Dealers Act, and they unlawfully and knowingly did upon the trade-in of used motor vehicles fail to show the licence plate numbers on sales orders contrary to Section 16(3)(d) of Ontario Regulation 98/71, and that they unlawfully and knowingly did upon the sale of used motor vehicles fail to show the recorded odometer readings on the sales orders, contrary to Section 16(2)(0) of Ontario Regulation 98/71 and that they unlawfully and knowingly did upon the sale of used motor vehicles fail to show the manufacturers serial numbers on the sales orders contrary to Section 16(2)(e) of Ontario Regulation 98/71 and they did upon the sale of used motor vehicles fail to show the licence plate numbers on sales orders contrary to Section 16(2)(g) of Ontario Regulation 98/71 and that they unlawfully and knowingly did upon the trade-in of used motor vehicles fail to show the manufacturer's serial number on the sales order, contrary to Section 16(3)(c) of Ontario Regulation 98/71.

Details with respect to the commission of the offences are set out in Exhibit 9 filed at this hearing. The Tribunal notes that 18 of the matters set out in Exhibit 9 relate to events subsequent to the meeting of the 17th of April 1980.

The Tribunal notes that convictions in respect of the above omissions, with the exception of the failure to show licence plate numbers on sales orders contrary to Section 16(2)(g) of Ontario Regulation 98/71, were registered against the Registrants as set out in Exhibits 8a, 8b, 8c, 8d and 8e filed at this hearing.

Record keeping as detailed in the regulations made under the Motor Vehicle Dealers Act are a very significant and integral part of the administration of the Act, and failure with respect thereto is a serious matter in the carrying on of business in accordance with the requirements of the said Act in the interest of the public.

The Tribunal notes that the failure to keep records is a matter which basically relates to the operation of the business and the capability of the responsible person to operate the business of a Motor Vehicle Dealer. It notes further that the actions of Ralph Eggleston related to the operation of the business.

The Notice of Proposal was issued to revoke the registration of the registrants. However, after failure of the applicants to apply for renewal and termination of the registrations, they proceeded to apply for registration. Counsel for the Registrar, has in effect moved that the Notice of proposal be amended to be one for a Notice of Proposal to refuse registration. The Tribunal hereby grants the motion. The Tribunal is of the opinion that the applicants have not been prejudiced in this regard, being fully advised, that the Registrar is of the opinion that they are not entitled to registration for reasons related to matters set out in paragraph 5 of the Proposal. The Tribunal notes that the Registrar had ample time to have gone through the formality of amending the Notice of Proposal or of issuing a new Proposal in this regard. However, having in mind expeditious administration under the Act and the fact the applicants have not been prejudiced, the Tribunal grants the motion.

The Tribunal notes that in respect of the registration of Eggleston as salesman, that there is a provision for a further application under Section 21 of the Act.

The Tribunal by virtue of the authority vested in it under the Motor Vehicle Dealers Act, Section 7, directs the Registrar to carry out his Proposal to refuse to register the applicants.

The decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the two Members who concurred.

JAMES STEPHENSON

APPEAL FROM PROPOSAL OF
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
HERBERT A. KEARNEY, MEMBER

COUNSEL: JERRY INGRASSIA representing the Applicant
PETER J. WILEY representing the Respondent

HEARING
DATE: May 26, 1981

REASONS FOR DECISION AND ORDER

The Applicant requested a hearing before the Tribunal upon receipt of the Registrar's Notice of Proposal dated February 6, 1981 to revoke the former's registration under Section 5 of the Act for the reason stated therein, viz., that "the past conduct of the registrant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty".

Upon the evidence the Tribunal finds as follows:

On the 19th of January, 1981 the registrant was charged and convicted of the offence that during the years 1977, 1978, 1979 and 1980 at the municipality of Metropolitan Toronto in the Judicial District of York, and elsewhere in the Province of Ontario, he unlawfully did conspire with certain persons to commit an indictable offence, to wit; by deceit, falsehood or other fraudulent means, namely by the altering of odometers and misrepresenting the histories and conditions of used automobiles they were offering for sale, to defraud the public of more than \$200.00 in money, contrary to the Criminal Code.

The evidence further disclosed that the number of instances of odometer alteration included in this conviction was well in excess of two hundred.

The Applicant did not deny these facts of his criminal wrongdoing, to which he had pleaded guilty, but urged the Tribunal to vary the Registrar's Proposal through the imposition of terms and conditions or otherwise to mitigate its severity. In support of such request for leniency, certain witnesses appeared before the Tribunal who testified as to the moral qualities of the Applicant as well as to the high regard in which he was held by his peers and confreres in the used motor vehicle industry. A number of letters were submitted which were to similar effect.

One of the witnesses who gave evidence as to the Applicant's character (and who also provided a letter - Exhibit 9.g) was a clergyman who informed us that the Applicant was kind and generous, in his experience honest and honorable and who reminded us that many, perhaps most people, "have things happen that they're not too proud of". The Tribunal is grateful to the Reverend Harwood for his testimony which indeed weighed as heavily in the Applicant's favour as any other that we heard.

The other witnesses called by the Applicant, including an insurance dealer, appeared in one way or another, to a greater or lesser extent, either to have been or likely at some future time to be involved with the Applicant in the course of the business of buying and selling used cars.

In the course of his very able argument counsel for the Applicant reminded the Tribunal that his client had been very co-operative with both police and the prosecution after his arrest and also that Mr. Stephenson had been substantially fined by the Court of Criminal Jurisdiction. He submitted that the imposition by the Tribunal of a further penalty would be unfair and offend the rule against double jeopardy.

Of course the Tribunal's function in no way should conflict with that of the law courts, nor does it. Its duty is to review the decision of the Registrar, which in this case was his Proposal to revoke the Applicant's registration upon the ground that, as a result of the past conduct of the registrant, there exists reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The evidence disclosed that the Applicant's crime, to which he had been convicted upon a guilty plea, comprised an elaborate, sophisticated, well thought-out and skillfully executed scheme to methodically and systematically defraud large numbers of the public by altering odometers of used cars in such a way as to make them appear to be more valuable than in fact they were and thereby to induce members of the public to pay more for such cars than they were worth; thus, by criminal means, providing the Applicant with a monetary benefit.

The Tribunal takes an exceedingly serious and unfavorable view of this, and especially considering the very large number of instances - over 200 - in which these crimes of odometer spinning took place before they were fortuitously detected.

The businessmen called to give evidence in support of the Applicant testified that they trusted him fully and were willing to do business with him. But these were not the sort of persons the Applicant has been in the habit of defrauding; to the contrary, he took pains during his career in the used car business to treat other members of the industry with studied honesty. This was in his interest. The people who were cheated, who received less than they were bargaining for as a result of the Applicant's systematic frauds - of which over 200 have been proven - were members of the public.

The function of the Tribunal is not to punish. In a case like this it is to protect the public interest. What we have heard is evidence of an intelligent, efficient program to defraud the public, all the more dangerous because of the subtlety and skill displayed in its implementation and which may or may not have been actually condoned by others involved in the industry.

The Tribunal is concerned not only that the law be administered in such a way as to protect the public but with the way this is perceived both by the public and the industry.

The continued registration of the Applicant in the motor vehicle sales industry would, in the Tribunal's opinion, which is unanimous, expose the public to an unacceptable risk as well as the industry at large to the false and erroneous impression that such frauds will be tolerated. The Registrar is

therefore Ordered and Directed to implement his Proposal and to revoke the registration under the Act of the Applicant James Stephenson forthwith.

IN THE MATTER OF THE MOTOR VEHICLE DEALERS ACT,
REVISED STATUTES OF ONTARIO, CHAPTER 475 AS AMENDED

AND IN THE MATTER OF
PAUL TURENNE

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS SALESMEN,

Respondent

ORDER

UPON the application to the Tribunal by the Respondent for the issuance for a decision and order of the Tribunal pursuant to Section 4 of the Statutory Powers Procedure Act, 1971, and having read the consent of the parties hereto dated the 2nd day of June and the 17th day of June to the disposition of the proceedings without a hearing as evidenced by the execution thereof by the Respondent and by the Applicant filed and attached hereto.

NOW THEREFORE this Tribunal doth order that this matter be and the same is hereby disposed of without a hearing on the basis that the terms and conditions set forth in the said consent and expressly thereby accepted and agreed to by the Applicant shall be in force and apply to the Applicant in accordance with such consent.

DATED at TORONTO, Ontario this 3rd day of July, 1981.

ROBERT TURNBULL

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION AS A MOTOR
VEHICLE SALESMAN

TRIBUNAL: MARY JANE BINKS RICE, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
MURRAY FELDMAN, MEMBER

COUNSEL: GEORGE J. PARKER representing the Applicant
PETER J. WILEY representing the Respondent

HEARING

DATE: July 16, 1981

REASONS FOR DECISION AND ORDER

On October 2, 1980, Robert Turnbull applied for registration as a motor vehicle salesman pursuant to Section 3 of the Motor Vehicle Dealers Act Revised Statutes of Ontario 1970 Chapter 475 as amended. At that time, Mr. Turnbull was engaged in a training programme with Morris C. Carter, a motor vehicle dealership in Hamilton, Ontario. Upon reviewing the application of Mr. Turnbull, the Registrar requested an interview with the Applicant for more facts to enable him to make his decision as to registration, and on December 10, 1980, the interview of Mr. Turnbull by Alan W. Abrams, the Registrar, took place. On December 22, 1980, the Registrar issued a Notice pursuant to Section 7 of the Motor Vehicle Dealers Act indicating his proposal to refuse to grant registration as a motor vehicle salesman to the Applicant.

The Registrar relied on two grounds pursuant to Section 5 of the Act for refusal to register: firstly, that the past conduct of the Applicant afforded reasonable grounds for belief that the Applicant would not carry on business in accordance with law and with integrity and honesty and secondly, that with respect to his financial position the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business. It is, of course, from this proposal that the Applicant has appealed to the Tribunal for a hearing.

In order to substantiate the second ground set forth in the proposal, the Respondent led evidence by way of testimony of the Registrar, Alan W. Abrams, and through documentation introduced through him, that the Applicant was an undischarged bankrupt. The Applicant had been involved as an owner and President of Turnbull Travel Tours Limited. The company was registered under the Travel Industry Act as an agent, commencing on November 10, 1977 and terminating on July 21, 1980. On July 18, 1980, the Board of Trustees of the Travel Industry Act 1974 ordered payment of claims from the Compensation Fund in excess of \$7,000.00. The Applicant later testified, which testimony was not contradicted, that his insurers and the cancellation of his \$1,000.00 indemnity bond with the fund met \$6,000.00 of that cost to the fund. On November 10, 1980, the Applicant personally made a general assignment for the benefit of creditors. The Respondent suggested that on the basis of the status of the Applicant and his dealings with the fund, he would not be financially responsible as a motor vehicle salesman. The Tribunal heard evidence as to the financial responsibilities of a salesman in the ordinary course of his employment and was informed that a salesman is often entrusted with a deposit from \$100.00 to \$1,000.00 and that this might be for a period lasting forty-eight hours. The Registrar thought the usual deposit today would be \$500.00 to \$1,000.0

As to the general allegations of financial irresponsibility, the Tribunal finds that the evidence before it is insufficient for the Tribunal to conclude that the Applicant would be financially responsible. The only suggested evidence before the Tribunal of financial irresponsibility is the fact of the Applicant's bankruptcy. Evidence appeared to indicate that the amount of claims paid for by the fund was small compared to the normal volume of the Applicant's business. The Applicant had responsibly returned several cheques to clients when he was informed that he could no longer meet his liabilities, and this at a time when we can only assume that he was under the gravest financial pressure. There was nothing in the evidence led by the Respondent to indicate that there was anything improper rather than unfortunate in the Applicant's assignment. The Tribunal finds that the fact of the Applicant's bankruptcy per se is not evidence of financial irresponsibility and that there is nothing to therefore suggest that from the circumstances of the Applicant's bankruptcy he would conduct himself irresponsibly with customer deposits.

As to the second ground, the Registrar led evidence that the Applicant conducted himself as a motor vehicle salesman from December, 1980 until June, 1981 although he had been informed by the Registrar that he was not to sell motor vehicles. The Tribunal finds as a fact that the Applicant participated in the sale of motor vehicles and that he had been informed by the Registrar that he could not do so. The Tribunal also finds as a fact that there was no evidence that Mr. Turnbull ever exclusively completed a sale. The Applicant testified that he believed he could continue in the training programme with the dealership until the hearing before the Commercial Registration Appeal Tribunal and that he could not be "on the floor" of the dealership but that he could assist in sales. The Tribunal finds that similar behaviour for at least two other salesmen was brought to the attention of the Registrar and that the Registrar did not consider this sufficiently serious or improper conduct in itself to warrant refusal of registration. The Tribunal was not informed of any action taken against the management of the dealership for permitting this conduct. Based on the attitude of the Registrar to the conduct of other applicants for registration and management, the Tribunal finds that this particular behaviour on the part of the Applicant does not constitute reasonable grounds for belief that the Applicant will not carry on business in accordance with law, integrity and honesty.

The Tribunal by virtue of the authority vested in it under The Motor Vehicle Dealers Act, Section 7, directs the Registrar to refrain from carrying out his proposal and to register the Applicant forthwith as a motor vehicle salesman.

DAVID M. YOUNG

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF MOTOR
VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION AS A MOTOR
VEHICLE SALESMAN

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN MORNINGSTAR, MEMBER
GRANT BROWN, MEMBER

COUNSEL: NO ONE APPEARING for the Applicant
PETER J. WILEY representing the Respondent

HEARING

DATE: December 15th, 1981

REASON FOR DECISION AND ORDER

This has been a hearing to consider an appeal by Mr. David M. Young from the proposal of the Registrar of Motor Vehicle Dealers and Salesmen to refuse to grant registration to him as a salesman.

Mr. Young as applicant or appellant, failed to appear and he has failed to prosecute his appeal other than by submitting a letter, Exhibit 3, which we consider offers us inadequate grounds or reasons upon which we can allow his appeal. Apart from all else, there has been no opportunity to cross examine him upon this exhibit.

The Registrar's Proposal to refuse to register the applicant is based on two principle grounds, to wit, firstly that the applicant's past conduct affords reasonable grounds for belief that the applicant would not carry on business in accordance with law and with integrity and honesty, and secondly that he would not be financially responsible in the conduct of his business.

In support of these propositions the Registrar has proven to the Tribunal's satisfaction that the applicant has a very considerable and reasonably recent record of criminal convictions and these indicate in our opinion, that this applicant is lacking in integrity or lacking in sufficient

integrity to warrant his registration as a motor vehicle salesman. Secondly, the applicant in our view is lacking in financial responsibility by reason of the undischarged or unpaid judgement presently registered against him as evidenced by the abstract of writs of execution entered as Exhibit 8.

In consequence of the foregoing considerations the Tribunal orders and directs that the proposal of the Registrar of Motor Vehicles be upheld and implemented forthwith, that is to say the Tribunal directs the Registrar to carry out his proposal.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

ACCUDIV GROUP INCORPORATED

APPEAL FROM PROPOSAL OF REGISTRAR
 UNDER THE MORTGAGE BROKERS ACT
 TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE CHAIRMAN AS CHAIRMAN
 WATSON EVANS, MEMBER
 E. EXTON, MEMBER

COUNSEL: DANIEL BANGARTH, representing the Applicant
 PETER J. WILEY, representing the Registrar

HEARING

DATE: OCTOBER 6, 1981

REASONS FOR DECISION AND ORDER

The Notice of Proposal of the Registrar of Mortgage Brokers is a Notice of Proposal to revoke the registration of the Applicant, Accudiv Group Incorporated. On page 2 of the Notice of Proposal the Registrar has enumerated his Reasons for proposing to revoke that registration. These are itemized and they are two: "Firstly", he states, "I am of the opinion, having regard to the financial position of the Registrant, that it cannot reasonably be expected to be financially responsible in the conduct of its business; secondly, I am of the opinion that the past conduct of the officers and directors of the Registrant afford reasonable grounds for believing that its business will not be carried on in accordance with law and integrity and honesty.

On page 3 particulars are listed; these are six in number. The first is that the Registrant "generally has failed to maintain proper and up-to-date books, records respecting its business, and, in particular, he cites three instances. In the opinion of the Tribunal it is true that the Registrant has failed to maintain adequate books and records and we feel there is considerable scope for improvement of these.

The second item of the particulars cited is that "the Registrant generally is in a weak financial position." The Tribunal concurs in this, but the Tribunal finds that the financial position of the Registrant has been gradually improving every year over the last several years. We note that there has been a steady improvement.

Item number 3 of the particulars is stated as follows: "Donald Buckle, who is President and Director of the Registrant is personally indebted to various parties. He is presently unable to pay his debts and from time to time garnishee orders have been obtained in respect of his debts by his creditors." The Tribunal feels that Mr. Buckle may be able to extricate himself and we wish to see him given a chance to do so. We consider that, in the circumstances as they were explained to us during the course of the hearing, there is an excellent chance for this to come about.

Item 4: "From time to time the Registrant has used its trust account to pay certain operating expenses " incurred during the course of its business. We find that this is true, but we find nothing either illegal or terribly exceptionable in this in the peculiar circumstances which were explained to us although the practice is not to be encouraged.

Item 5: "As of March 20, 1981 the Registrant's general account was overdrawn." The overdraft, as determined by Mr. Livingston, was overstated because it reflected cheques as outstanding which had been prepared but not released.

Item 6: "On various occasions cheques issued by the Registrant have not been honoured." Based on the evidence submitted it appears that this phenomenon was due to the bank's action, not due to wilful deception or to any desire to wilfully deceive by the Applicant.

To have 1,600 transactions and only two complaints, for both of which we have heard reasonable and acceptable explanations, is an almost perfect record and a positive rather than a negative consideration. The Applicant, when faced with financial difficulties appears to have taken prudent steps to reduce its overhead expenses and Mr. Buckle seems to have striven to reduce his indebtedness. taking steps which included the reduction in his own family's standard of living.

The Tribunal's decision in the Wenmore case was cited. In our recollection and opinion the facts of that case were quite significantly different.

The Tribunal's decision in this case is that the Applicant's registration shall be continued but on terms which are as follows:

1. Proper accounting records shall be maintained, including among other things, a monthly reconciliation of the bank account(s).

2. Audited financial statements shall be provided for the Registrar annually in accordance with the Regulations to the Act. The audited statements for the last fiscal year are to be provided by December 31, 1981.
3. Clients' funds are not to be administered as long as there is bank indebtedness or any judgments are outstanding against either the Corporation or Mr. Buckle.
4. In view of the foregoing, the trust account will be inactive until the bank indebtedness is eliminated.
5. The present arrangement whereby a car is provided for Mr. Parry must be terminated.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

ZENON BRIL

APPEAL FROM PROPOSAL OF REGISTRAR UNDER MORTGAGE
BROKERS ACT
TO REFUSE TO RENEW APPLICANT'S REGISTRATION AS A
MORTGAGE BROKER

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
MURRAY SUSSMAN, MEMBER

COUNSEL: S. BRAITHWAITE representing the Applicant
A.N. MAJAINA representing the Respondent

HEARING January 20, 22, 23
DATES: and 26, 1981

REASONS FOR DECISION AND ORDER

(On January 26, 1981, at the conclusion of this hearing, which began on January 20, 1981, the Tribunal's decision was delivered orally. Counsel for the Registrar requested that written Reasons for the same be provided by the Tribunal which now therefore follow.)

This hearing was instituted at the instance of Zenon Bril, as a registrant under the Mortgage Brokers Act of Ontario, pursuant to Section 7 of that Act. Its purpose was to consider whether or not the Tribunal should direct the Registrar of Mortgage Brokers to carry out his proposal set out in a Notice of Proposal dated November 26, 1980, which was a proposal to refuse to renew the registration as a mortgage broker of the said registrant for the reasons set out therein, or whether or not the Tribunal should direct the said Registrar to refrain from carrying out his proposal or make an order attaching such terms and conditions as the Tribunal might consider proper to give effect to the purposes of the Act.

The Tribunal's jurisdiction to hear and conduct such a hearing is derived from the Act. It is the Tribunal's duty to give effect to the purposes of the Act, principal among which is the protection of the public.

Section 4 of the Act reads in part as follows:

- (1) No person shall carry on business as a mortgage broker unless he is registered by the Registrar under this Act.

Section 5 of the Act reads in part as follows:

- (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business;

OR

- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

Section 6 of the Act reads as follows:

- (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.
- (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if he were an applicant, or where the registrant is in breach of a term or condition of the registration.

The said Section 7 reads in part as follows:

- (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his proposal, together with written reasons therefor, on the applicant or registrant.
- (2) A notice under subsection 1 shall inform the applicant or registrant that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under

subsection 1 is served on him, notice in writing requiring a hearing to the Registrar and the Tribunal, and he may so require such a hearing.

The Tribunal considered the Registrar's proposal in this case, which was a proposal to refuse to renew the registration as a Mortgage Broker of the said Zenon Bril, and it considered the reasons set forth in it. These were two in number and are as follows:

I am of the opinion that the Registrant is not entitled to Registration for the following reasons:

1. Having regard to his financial position, the Registrant cannot reasonably be expected to be financially responsible in the conduct of his business. In this regard I am taking into account the fact that there have been for some time past and continue to be writs of execution outstanding against the Registrant or his wife or both of them.
2. The past conduct of the Registrant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. In this regard it is alleged as follows:
 - (a) in applications dated July 5, 1977, June 12, 1978 and June 15, 1979 the Registrant furnished false information in respect of unpaid or outstanding judgements against him and thereby contravened Section 31 of the Act. The Registrant also completed affidavits in respect of the said applications attesting to the truth of the information contained therein.
 - (b) during the period of August 25, 1976 to August 16, 1977 the Registrant carried on business as a mortgage broker without being registered by the Registrar and thereby contravened Section 4 of the Act.
 - (c) during the period of August 16, 1977 to November 12, 1980 the Registrant failed to keep proper records and books of account as prescribed by Section 6(1) of O. Reg. 461/71 as amended and thereby contravened the said section.

- (d) during the period of August 16, 1977 to November 12, 1980 the Registrant failed to keep and maintain records as prescribed by Section 6(2) of O. Reg. 461/71 as amended and thereby contravened the said section.
- (e) during the period of August 16, 1977 to August 13, 1980 the Registrant failed to maintain a separate trust account as prescribed by Section 5(2) of O. Reg. 461/71 as amended and thereby contravened the said section.
- (f) during the period of August 16, 1977 to November 12, 1980 the Registrant failed to deposit all funds received by him into a mortgage broker's trust account within two banking days of their receipt and thereby contravened Section 5(4) of O. Reg. 461/71 as amended.
- (g) during the period of August 13, 1980 to November 12, 1980 the Registrant disbursed monies held in trust, or part thereof, otherwise than in accordance with the terms and conditions upon which the monies were received and thereby contravened Section 5(6) of O. Reg. 461/71 as amended.
- (h) during the period of August 16, 1977 to November 12, 1980 the Registrant failed to deliver to each borrower a statement of mortgage in the manner prescribed by Section 3(8) of O. Reg. 461/71 as amended and thereby contravened the said section.
- (i) the Registrant is now and for some time past has represented to prospective clients that he has access to funds for investment in residential mortgages at 9% per annum and in commercial or industrial mortgages at 9 1/4 - 10% per annum. Having regard to existing market conditions, I am not satisfied the Registrant can in fact make funds available to his clients at those rates.

It may be noted that while the Registrar's Reasons for Proposal were two in number, corresponding with subsections (a) and (b) of Section 5(1) of the Act, there were actually ten

individual points of complaint and that any one of these, alone, if established, would have been sufficient to justify his proposal to deprive the Registrant of his Registration. In short, the Registrar's complaints against the Registrant brought before this Tribunal were both numerous, and at least on the face of them, sufficiently serious to arouse very serious concern not just as to the Registrant's suitability for Registration as a practising member of this industry, but, beyond that, for the security of the public for so long as this registrant continued in business. In short, from the outset of this hearing, from the moment the Tribunal had before it the Registrar's Reasons for his Proposal to deprive this Registrant of his Registration, which was Exhibit 4, the Tribunal took a very grave view of this case and regarded it, as matters stood superficially, as one where there was a potential major threat to the security of the public and therefore as a case demanding the most serious attention not only from the Tribunal but from all parties involved in it.

The hearing began with a request or motion for adjournment by Counsel for the Registrant. The Registrar himself had sent a letter to the Registrar of the Tribunal (Exhibit 5) dated January 9th, 1981 and reading in part "... I realize I asked for the hearing but, I did not expect it to be so soon. I would like the hearing to be postponed until further notice..." The reason for the motion brought at the outset of the hearing was to enable Counsel for the Registrant to further and better prepare his case. Counsel for the Registrar objected to this delay on the grounds that pending the Tribunal's decision of the matters at issue the Registrant would remain in business to the possible detriment of the public interest and, in support of his opposition to the motion, he proposed to call a witness whose testimony, he said, would illustrate the gravity of the case and tend to justify denial of the motion for adjournment. Counsel for the Registrant then moved that members of the public present in the hearing room, including members of the press, be excluded and that the proposed testimony be heard in camera pursuant to Section 9(1) (b) of the Statutory Powers Procedure Act, R.S.O. 1971 as amended, on the ground that intimate financial matters relating to the Registrant and his business might be disclosed by such testimony to his detriment.

The first subsection of the said section reads as follows:

9. (1) A hearing shall be open to the public except where the tribunal is of the opinion that,

- (a) matters involving public security may be disclosed;
or
- (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

in which case the tribunal may hold the hearing concerning any such matters in camera .

After a brief recess to enable the Tribunal to consider this motion for exclusion of the public, the Tribunal had not found that "... the desirability of adhering to the principle that hearings be open to the public" had been outweighed by anything brought to its attention by Counsel or otherwise.

The Tribunal then heard testimony, in support of the Registrar's objection to the proposed adjournment of the hearing from the witness Donald Frederick Pogue.

Mr. Pogue, an investigator for the Commercial Protection Division of the Ministry of Consumer and Commercial Relations, was, prior to his employment by the Ministry, a staff sergeant of the Metropolitan Toronto Police serving 25 years with the investigative branch. The Tribunal learned from his testimony, both in chief and in cross-examination, that the complaints against the Registrant were serious. The Tribunal gathered that the Registrant, as a registered mortgage broker, was alleged to have been in the practice of accepting deposits from applicants for (very attractive) mortgage loans and, in effect converting these deposits to his own use thereby committing infractions of the Mortgage Brokers Act. It seemed that the sums involved might have been in the area of \$185,000, and what concerned the Tribunal greatly was the possibility that the alleged wrongdoing might still be going on and perhaps be likely to continue for as long as the Registrant retained his Registration as a registered mortgage broker under the Act.

After recessing to consider its decision upon the motion of request for adjournment, the Tribunal denied the same and its reasons for that decision, delivered orally, were stated, in part, as follows:

The motion which the Tribunal has been considering all morning is one for an adjournment, a motion which was brought by Mr. Braithwaite. Mr. Braithwaite's grounds were outlined by him in his opening remarks and the Tribunal is very conscious of the fact that Mr. Braithwaite has got a very serious responsibility in acting for this particular Registrant and that he wishes to prepare his case as thoroughly as he may and that he wishes to discharge his responsibility to his client as well as possible. It is an onerous responsibility and the amount of work in discharging that responsibility is undoubtedly going to be very substantial.

On the other hand, the Tribunal is extremely responsive to the submissions which have been presented by Mr. Majaina on behalf of the Registrar. The Registrar has a very serious responsibility to the citizens of this Province. Weighing the interests of those who are involved, including the interests of the public, and having heard the evidence which has been furnished to us this morning, it is the unanimous opinion of the Tribunal that this matter should proceed with all possible speed and that the issues before us at this hearing should be settled.

The Tribunal accordingly denied the motion for adjournment and ordered that the hearing continue. (It noted that it would not be sitting the following day, however, which amounted to some respite for the Registrant.)

The motion for adjournment thus disposed of, this hearing then continued for the balance of the first day (January 20th). Again Mr. Pogue gave evidence-in-chief. He testified that he attended upon the Registrant, Zenon Bril, at his place of business at 5446 Ferry Street, Niagara Falls, on January 9th, 1980 at 10:45 a.m. "At this time it was found through conversation with Mr. Bril that he had no trust account as outlined in the Mortgage Brokers Act... he had no records of that and he also had no trust account ledger".

On September 23, 1980, at 1:00 p.m., accompanied by inspectors Donald Forbes and Bill Magyar, Mr. Pogue testified that he made a further attendance upon Mr. Brill. On this occasion Mr. Brill stated that he had a trust account at the Canadian Imperial Bank of Commerce, Niagara Square, with \$3,700 to \$4,200 on deposit. He said that he kept no trust ledger because his volume of business was so small that he didn't bother; "I only have a couple of deals so I don't bother." Asked whether he deposited monies in his trust account within two days he replied that he didn't bother to put them in. Mr. Pogue was reading from his notes and he testified that his September 23, 1980 interview with Mr. Brill had continued as follows:

Question: "Why? The regulations call for them to be deposited within two days." Answer: "I cashed the cheques and I hold the money. If I have expenses in the deal I use the money."

Question: "That is not allowed. The money belongs to clients. It has to be in a trust account. What happens if the clients demand their money back?" Answer: "I will speak to them and explain my position. If I have to I will borrow money; I have friends."

At this time I informed Mr. Brill that he can't borrow money in that manner. Mr. Brill's reply to this: "Why pick on me? Where was the government when I lost all my money to Astra? I lost everything."

Question: "Do you have any completed mortgages?" Answer: "Not yet. Leave me alone until October 15th. I am getting a lump sum of money, \$100,000,000.00 from mortgages. Question: "Where is the money coming from? Where can you borrow money and lend it out at 9 1/2% You must be getting it at 8% or so?" Answer: "Out-of-country money, off-shore, petrodollars. I have connections, New York, Switzerland, all over."

Question: "Where is the actual source of the money?" Answer: "I don't know. My lenders keep this a secret."

Mr. Pogue's testimony, still based on his notes, continued as follows:

Question: "You lend money to sovereign governments?" Answer: Yes, I work a deal at \$2,000,000.00 Panama and Mexico."

Question: "Did you make any money? Answer: "I got gypped out of my share."

Question: "How many deals do you have on the go?" Answer: "Ten deals, five or ten million dollars."

Question: "Can we see those deals?" Answer: "They are not completed. I will show them after October 15th."

Question: "Where are the deals?" Answer: "They are not complete."

The question: "Where are they?" Answer: "Not here. Leave me alone until October 15 and I will give you everything."

Question: "How long have you been in business?" Answer: "Four years."

Question: "Have you ever kept business ledgers?" Answer: "No."

Question: "If you are not getting your fees until later how are you living? Do you have a bank loan?" Answer: "The bank will give me no money. I operate from friends."

Question: "You have any other bank accounts at any other banks, any other names?" Answer: No, Bank of Commerce, Niagara Square, only one."

Question: "Do you have, or have you received any cheques or cash from any of your agents that you haven't put in your trust?" Answer: "No. Why are you picking on me? October 15th I will tell you everything."

That was basically the interview with Mr. Brill that day.

Earlier Mr. Pogue had testified that (again on September 23, 1980) he had asked Mr. Brill "Who are your lenders" (i.e. - the source of the funds for the mortgages Mr. Brill was meant to be arranging and in respect of which he was

accepting deposits on account of commission) and the reply to that question had been:

"That is a secret. Well, I will tell you one at this point." Mr. Bril handed me a letter and pointed to a name at the top, "he is my lender in New York. Mr. Bril then stated, "I have to be careful. I have lost lenders before. I had a deal with Air Canada, a hundred million. I lost that deal, got no money from it."

(He then went on to describe his transactions involving sovereign governments, Panama and Mexico, as mentioned above.)

Mr. Pogue's testimony continued:

On Wednesday, September 24th (1980) we had occasion to be in the company of Donald Forbes and Steve Magyar and had occasion to interview a Mr. Frank Latchford at his home in Toronto. As a result of this interview I obtained from Mr. Latchford numerous files which I took back to the office and had occasion to Xerox. I then proceeded to put these together in a file and make a spread sheet out. 3:20 the same day I contacted - as a result of information from those forms - I contacted Mrs. Upton who was the manager of the Imperial Bank of Commerce, Queen and Erie, Niagara Falls. (Sic.)

At this time I learned that Mr. Bril had opened a new account in July of 1980. At this particular branch there was an Ontario numbered company 452635. As a result of this information, on Thursday, September 25th, again in the company of Donald Forbes and Steve Magyar I attended at the Canadian Imperial Bank of Commerce, Queen and Erie and at 12:45 p.m. a search warrant, correction, 1:00 p.m., a search warrant was executed at the bank account, which I received Xeroxed copies of the aforementioned again, from Mrs. Margaret Upton. (Sic.)

Later that same afternoon we attended at the Canadian Imperial Bank of Commerce at the Niagara Plaza which was listed as a trust account in the name of Zenon Bril. And certain information was learned at that time.

On Friday, September the 26th, 1980, at approximately 10:30 a.m., in company with investigator Donald Forbes and Niagara Regional Police Force Sergeant Michael O'Connors, we attended at 5446 Ferry Street at which time an order for search was executed on the premises.

At this time there were numerous papers seized. These were in the form of records, mortgage applications, names. In that there was approximately, five boxes, banker's boxes, taken out.

The next interview with Mr. Bril was on Tuesday the 30th, 1980. At approximately 9:40 a.m. I attended at 5446 Ferry Street. I was accompanied by Donald Forbes, an investigator. At this time Mr. Zenon Bril was present. Almost immediately as we walked in the door ... (Mr. Bril) ... posed the question to me.

He said, "Are you here to close me up? I need until October 15th to get the money and then everything will be straightened out."

At this particular time I replied: "We want to ask you a few more questions in regard to some evidence that we have found." Mr. Bril replied, "Okay, my lawyer says I shouldn't talk but go ahead."

At this point, "I am going to show you some cheques drawn on your numbered company, the account at Queen and Erie. I would like some explanation of them if you don't mind." Answer: "Okay." "I am showing you a cheque, Ontario Motor Sales, Limited, August the 22nd, 1980, for \$14,982.00." Mr. Bril replied: "That is for my Cadillac."

Question: "Why did you buy a Cadillac with trust funds?" Answer: "It was a good buy. I couldn't pass it up. When I get the money October 15th I will replace the money."

Question: "I am showing you a cheque made out to Nicoletti of August 29, 1980, \$23,520.00." Answer: "That is for a mortgage I arranged. Mr. Nicoletti is the lawyer. I take it the money was from deposits received." Answer: "Yes, no one is going to lose money."

Question: "I am showing you a cheque made out to William Booth, barristers and solicitors for \$19,000.00. What can you tell me about it? Answer: "Another mortgage."

Question: "I am showing you the cheque made out to the Bell for \$287.00." Answer: "For my own phone bill."

A question: "Kingsway Motel, cheque for \$2,150.00. What can you tell me about it?" Answer: "That is deposit return from another deal."

Question: "What does this cheque, dated August 27th, 1980 for a hundred dollars in the name of Peter Sukkau, Limited represent?" Answer: "That is for commission I owed him."

Question: "What does this cheque dated August 23rd for \$308.00 in the name of the Co-operators represent?" Answer: "That is the insurance for the Cadillac." Question: "What does this cheque, dated September 12th, 1980 for \$350.00 in the name of Tom De Jager?" Answer: "Rent, back rent on my house. He is my landlord."

Question: "What does this cheque, dated 22nd, 1980 for \$1,550.00 in the name of De Jager represent?" Answer: "More rent. I still owe more money."

Question: "I am showing you a withdrawal slip, drawn on account number 7112513 for 452635, Ontario, Limited for \$2,000.00. What does it represent?" Answer: "I took it out. I needed it for a purpose."

Question: "For a ---" "For a purpose."

Question: "What purpose?" Answer: "I don't remember. I spent it on the business."

Question: "I am showing you safety deposit slips, Canadian Imperial Bank of Commerce, account number 71-12513 Ontario company 452635, did you make them out?" Answer: "At this time I accepted the Xeroxed copies that I have received from the bank. Yes, it is my writing."

Question: "What did the names and deposits signify?" Answer: "Cheques and the names of the people who sent them to me."

Question: "Do you look upon this account as a trust account?" Answer: "No. The trust is at Niagara Plaza. This account is for the company."

I then said: "Mr. Brill", addressing him, "Mr. Brill, on more than one occasion you were asked by us if you had any other account in any bank and you told us, 'No'". Answer: "I didn't tell you about it because I needed time. I was going to tell you about October 15th."

Question: "Do you have any personal monies?" Answer: "I have a judgment against a guy for \$5,000,000.00."

Question: "Who has signing privileges on the account?" Answer: "The whole family. It is okay. I opened the company for mortgage arrangements."

Question: "Why do you use trust money for your personal business, like, paying your insurance, and Bell Telephone?" Answer: "I needed money. I needed the money. I didn't want the sheriff's officers to know that I had money. That is why I opened the business account."

This interview, which according to Mr. Pogue's testimony as quoted above began at approximately 9:40 a.m. on Tuesday, September 30th, 1980, concluded at 10:30 a.m. with the arrival of Sergeant Mike O'Connors and Sergeant Tim Tiggin of the Niagara Police Department who had been called by Pogue and his colleagues who then and there placed Mr. Zenon Brill under arrest, charging him with Criminal Breach of Trust under Section 296 of the Criminal Code.

At this point in his examination of the witness Donald Frederick Pogue, counsel for the Registrar introduced Exhibit 8, consisting of documentary evidence relating to 29 individual mortgage application deals and including a "spread sheet" which provides particulars of these. Mr. Pogue testified that the total amount received by way of deposits relative to these mortgage applications was approximately \$185,000. with approximately \$43,050. of that amount presently frozen in the

bank by order of the Director of the Consumer Protection Division of the Ministry of Consumer and Commercial Relations and the balance dispersed - presumably improperly - in an amount which would be between \$140,000 and \$150,000. The testimony and other evidence relating to this exhibit disclosed that some of the deposit monies were taken in cash, others went into an account operated by Mr. Bril in the name of a numbered company at the Queen and Erie branch of the Canadian Imperial Bank of Commerce. It further appeared that none of these mortgage applications was ever put through - i.e., resulted in a mortgage loan being received by any of the applicants. Mr. Pogue also testified that some of the original depositors - mortgage applicants who had made deposits to Zenon Bril - had asked for their deposit money back and had received it back, but that the money given them was trust money received from newer depositors. Nine persons, he said, had asked for their deposits back and had been given money. Five different bank accounts, he said, had been discovered which Mr. Bril opened in various names - usually numbered Ontario Companies - for the purposes of his dealings with the funds deposited with him by mortgage applicants.

This testimony offered by Mr. Pogue, a man trained and greatly experienced in the investigation of frauds, whose professional background has been stated above, and who seemed an honest and competent witness, seriously and gravely impressed the Tribunal. When it had been completed, and towards the end of the first day of the hearing, Counsel for the Registrar requested the Tribunal to make an interim order whereby the Registrant would be restrained during the currency of the hearing from taking into his possession further trust monies from members of the public or opening additional bank accounts for the wrongful or improper disposition of such monies or otherwise. The Tribunal refused to make such an order on the grounds that it had no authority to do so.

The hearing was adjourned to January 22nd. During the intervening day the Tribunal did not sit. This was to accommodate Counsel for the Registrant. On January 22nd the Tribunal sat briefly and heard from Counsel for the Registrant who was unable to proceed as he was tied up in a County Court matter. On January 23rd, after additional delays occasioned by Counsel for the Registrant, the hearing reconvened at 1:10 p.m. A few minutes earlier the Registrar of the Tribunal and Counsel for the Registrar of Mortgage Brokers had been served on behalf of the Registrant with a Notice of Application for Judicial Review, together with a supporting Affidavit. Such application was to be made on February 6th and it appeared that the relief sought by the Applicant mentioned in the Notice of Application (the Registrant herein) was an order prohibiting

this Tribunal from continuing this hearing. Counsel for the Registrant informed the Tribunal that it was his position that the hearing ought to be brought to a halt pending the outcome of the said application. Counsel for the Registrar urged the contrary. The Tribunal recessed to consider whether or not the hearing should continue and then delivered the following decision:

We have before us a Notice of Application which will likely to be brought, on behalf of the applicant, Zenon Bril, before the Supreme Court of Ontario on Friday the 6th day of February next. It will be an application for an order prohibiting this Tribunal from taking further proceedings in respect to this hearing

It has been suggested to this Tribunal, so far as we have been able to interpret what has just been said to us by learned counsel for the said Zenon Bril, that the present proceedings before this Tribunal in respect of the Proposal of Registrar of Mortgage Brokers to refuse to renew the registration of the said Zenon Bril as a mortgage broker, and for the reasons set out in the Notice which is Exhibit 4 before us, ought now to be adjourned and suspended forthwith pending the outcome of said Motion before the Supreme Court of Ontario, or otherwise.

We have been referred to a decision of the Ontario Court of Appeal in the case of Re Cedarvale Tree Service and Labourers' International Union of North America, Local 183, which is reported at 22 Dominion Law Reports, 3rd Volume beginning at page 40. This is a decision of a very strong court. It was a court comprised of three justices presided over by the former Chief Justice of Ontario, Chief Justice Gale, Mr. Justice McKay and Mr. Justice John Arnup - a very strong court indeed. And it seems that although it does not deal with a decision of this specific Tribunal it does concern a decision of a similar Administrative Tribunal. We have been referred to certain specific words at the bottom of page 49 of that report and at the top of page 50. We conclude that a Tribunal such as the Commercial Registration Appeal Tribunal "is not required to bring its proceedings to a halt merely because it has been served with a notice of motion for an Order of certiorari or prohibition. It is entitled, if it thinks fit, to carry its pending proceedings forward

until such a time as an order of the Court has actually been made prohibiting its further activity or quashing some order already made by which it assumed jurisdiction."

In our opinion this authority is clearly on point and we shall follow the purport of it. It is the unanimous decision of the Tribunal that the proceedings presently before us must, in the performance of the Tribunal's duty, continue and the Tribunal orders accordingly; that is to say, this hearing is now resumed.

Counsel for the Registrar next introduced into evidence Exhibit 10, being a Certified Abstract of Writs of Execution and Liens against Mr. Zenon Bril as provided by the Sheriff of the Judicial District of Niagara South. This certificate disclosed 11 writs of execution in the hands of the Sheriff of Niagara against Mr. Bril. The aggregate of these was in excess of \$70,000. (The first two were registered respectively February 15th, 1974 and March 21st, 1975 totalling over \$48,000.) All these Writs of Execution were outstanding at the date of the Sheriff's certificate, January 15, 1981.

Mr. Steve Magyar, an inspector employed by the Registrar of Mortgage Brokers, was sworn. Exhibits 11a, b and c were shown to the witness and identified respectively as Registration Form 1 - application on behalf of Zenon Bril sworn July 5, 1977; Renewal Form 3, sworn by Mr. Bril July 12, 1978; and Renewal Form 3 sworn by Mr. Bril June 18, 1979. Each of these affidavits contained assertions by Mr. Bril that he had no unpaid judgments outstanding against him.

These matters, viz., the Sheriff's Certificate (Exhibit 10) and the Affidavits (Exhibit 11a, b and c) were germane to items 1 and 2(a) on page 2 of the Registrar's Notice of Proposal.

Mr. Magyar then testified that Mr. Bril had first been registered as a mortgage broker on August 16, 1977. A bundle of seven loan applications under the name of Zenon Bril, all dated prior to August 16, 1977, was introduced at Exhibit 13. The purport of these exhibits was that the Registrant was carrying on business as a mortgage broker prior to the date mentioned without being registered by the Registrar, as alleged at item 2(b) of the Notice of Proposal.

Concerning item 2(c) of the Notice of Proposal, an allegation that the Registrant failed to keep proper records and books of accounts as prescribed by law, the witness was asked what evidence or facts he had found during his inspection. He replied "It is not what I found but what I didn't find.... Mr. Bril....himself told me that he does not keep these books and didn't have any." (In this connection, also see the testimony of Mr. Pogue as to his interview with Mr. Bril on September 23, 1980.)

Concerning item 2(d) of the Notice of Proposal, Mr. Magyar testified he could find no records of this type either: "I asked Mr. Bril. He didn't have any books at all."

Concerning item 2(e) of the Notice of Proposal, the witness was asked if he had not already testified that the registrant was not keeping a trust ledger and he answered that he already so testified. "Did he have what is known as a client's ledger" he was asked and replied "No books at all". Then he was asked if he examined other application for mortgage loan forms during his inspection and replied he had examined about 500 files. "Did you find any deposit money entered into a trust account, the bank trust account? Did he have a bank trust account, by the way?" He was asked and replied "Not at the beginning - subsequent to my going there Mr. Bril designated the Canadian Imperial Bank of Commerce Account as a mortgage broker's trust account and that was only afterwards and only after that did he deposit, that I'm aware of, one deposit." (This was \$1,000 in respect to Dr. Rogers: the only deposit that had been made, according to the witness, "at that particular time", viz. August 25, 1980.)

Concerning item 2(f) of the Notice of Proposal, Mr. Magyar was asked: "...you have informed us that some deposit amounts did come to your attention, such as Dr. Jones. Do you know if they were deposited within two bank days as provided in the regulations?" His reply was "No, they were not."

Concerning item 2(h) of the Notice of Proposal which has to do with the statement of mortgage referred to in section 3(8) of Ontario Regulation of O. Reg. 461/71 as amended, the witness said he had examined 500 files; that 50 of these contained application forms, "That he had found only one which, apparently, had been given during the period when Mr. Bril was not registered".

It may be noted at this time that item 2(g) of the Reasons for Proposal was dealt with in the course of

Mr. Pogue's testimony. That item alleged improper disbursement of trust funds and it will be recalled that Mr. Pogue gave evidence concerning the purchase of a motor car, insurance for the same, and other expenditures.

No direct evidence was adduced concerning item 2(i) of the Reasons for Proposal.

On Monday, January 26th when the final day of the hearing began, counsel for the Registrant announced that he was not putting in any evidence at all. The Tribunal was surprised to hear this and informed learned counsel for the Registrant that it had at that point heard evidence submitted on behalf of the Registrar which, unless rebutted, would probably be accepted as establishing a prima facie case. The Tribunal stated to counsel for the Registrant "In the interests of fairness we would like to know if there is anything that can be said on behalf of your client which would counterbalance what is being said against him. What has been said against him is extremely serious." The Tribunal further stated "...if there is anything which can be brought to our attention which would outweigh the very serious allegations which have been brought, we would like to hear it and we would even consider having the hearing in camera. We want very much to learn if there are any mitigating facts before we reach our decision".

Notwithstanding these remarks, counsel for the Registrant reiterated his decision to call no evidence in reply to the Registrar's allegation and the evidence adduced in support of the same, by way of rebuttal, mitigation, correction or otherwise. This was, in the Tribunal's view, a very deliberate decision made on behalf of the Registrant and one whose effect on the outcome of the hearing, in the circumstances, having regard to the quality and volume of evidence against his client, was bound to be very serious.

The Registrar in his Notice of Proposal alleged two main grounds for proposing to terminate the registration as a Registered Mortgage Broker under the Mortgage Brokers Act of Mr. Zenon Bril, and these conformed with subsections (a) and (b) of section 5(1) of the Act. The first ground was that, having regard to his financial position, Mr. Bril could not reasonably be expected to be financially responsible in the conduct of his business. The Tribunal accepts the Sheriff's certificate entered as Exhibit 10 as proof that Mr. Bril, as of January 15th, 1981, was heavily indebted as a judgment debtor

and that the bulk of these debts had been outstanding for some considerable time, several years. The Tribunal finds as a fact that, in virtue of this circumstance, the Registrant, can not reasonably be expected to be financially responsible in the conduct of his business. This proof is accepted in accordance with the standard of proof established by this Tribunal in numerous cases over the years. The same standard of proof as that applied to a plaintiff in a civil case: reasonable and probable grounds for belief; the balance of probability. On the basis of this finding, the Tribunal Orders and Directs the Registrar to forthwith implement his proposal and terminate or refuse to renew the registration of the said Zenon Bril as a Registered Mortgage Broker under the Act.

As to the individual items of complaint referred to in the second ground for the Registrar's proposal, namely the items of complaint alleged in support of the proposition that "past conduct of the Registrant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty" the Tribunal accepts as proven Items 2(a) to 2(g) inclusive - several items in all. (Items 2(b) and 2(i) it regards as neither proven nor disproven. The Tribunal might almost, however, take judicial notice that it would have been very difficult during the years in question for anyone to have access to funds for investment in residential mortgages at 9% per annum and in commercial and industrial mortgages at 9 1/4 to 10% per annum.

The Tribunal finds that Mr. Bril acted contrary to law, contrary to integrity and contrary to honesty in respect of each of the complaints hereby accepted as proven and particularly in respect to the transfer or conversion of trust monies - deposits received from mortgage applicants, to his own use or into bank accounts or other places other than a proper trust account and within the time delimited by law.

The Tribunal has heard no evidence that any of the mortgage applications in respect of which funds came into the hand of Zenon Bril ever resulted in a mortgage being placed or any mortgage loan based on services provided by him, or otherwise, ever being made to any of the mortgage applicants with whom he dealt and from whom he took money - consequently, no commission was ever earned by Mr. Bril. Section 5(1) Ontario Regulation 461/71 made under the Mortgage Brokers Act reads as follows:

All funds received by a mortgage broker in connection with a mortgage transaction other than those which are clearly made as payments for fees earned shall be deemed to be trust funds.

Directive No. 179 of the Registrar of Mortgage Brokers, dated May 1st, 1979, reads in part as follows (at the second paragraph thereof):

Many brokers seem to feel that, even when a mortgage commitment is not obtained, they can automatically keep the deposit as earned fees and this is simply not the case.

The Tribunal emphatically endorses the above-quoted Directive and the same is incorporated as a reason for this decision. Accordingly the Tribunal Orders and Directs the Registrar of Mortgage Brokers to forthwith implement his proposal upon the basis of both the first and second grounds stated therein.

This decision is a unanimous decision of the Tribunal and these Reasons for Decision are delivered in response to counsel's request and are in accordance and conformity with the Oral Decision hereinbefore delivered on January 26, 1981.

JAMES E. TAIT

APPEAL FROM PROPOSAL OF
REGISTRAR OF MORTGAGE BROKERS
TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
ERIC EXTON, MEMBER

COUNSEL: ALFRED SCHORR representing the Applicant
PETER J. WILEY representing the Respondent

HEARING
DATE: April 8, 1981

DECISION AND ORDER

The Applicant, James E. Tait, has appealed to this Tribunal from a Proposal of the Registrar of Mortgage Brokers dated December 12, 1981, to refuse to renew his registration as a Mortgage Broker under the Mortgage Brokers Act, Revised Statutes of Ontario 1970, as amended. The reasons for the Registrar's Proposal were two and were set out in the Notice of Proposal at the bottom of page 1 thereof and at the top of page 2:

1. "Having regard to his financial position, I am of the opinion that the Registrant cannot reasonably be expected to be financially responsible in the conduct of his business.
2. I am of the opinion that the past conduct of the Registrant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty."

These reasons have been supported by allegations set forth at page 2 of the Notice of Proposal and in a certain supplementary notice dated March 18, 1981, as well as by the evidence submitted at this hearing. In order to uphold the Registrar's proposal to refuse to renew this registration, it is not necessary for the Tribunal to concur in both the reasons advanced by the Registrar; one will suffice. Nor is it necessary for the Tribunal to find as proven facts, all the assertions or allegations put forward by the Registrar. In respect to certain points raised in the Registrar's case, the Tribunal feels very strongly indeed, and it is the opinion of

the Tribunal that the Registrar's Proposal should be upheld by virtue of these without it being necessary to render an elaborate adjudication relative to various other elements of the case presented to us which, for the purpose of settling the basic issue (Should the Applicant's registration be allowed to continue or not?) may be redundant.

In the view of the Tribunal, the first reason advanced by the Registrar for refusing to renew (namely, "Having regard to his financial position, I am of the opinion that the Registrant cannot reasonably be expected to be financially responsible in the conduct of his business") has been more than adequately substantiated by the evidence. The Tribunal finds as a fact that the Applicant has, during the period December, 1973 to the present time, had a substantial number of Court Judgments registered against him. We find that he has been convicted of an offence under the Income Tax Act, and that there is no evidence before us that the fine imposed upon him by the Provincial Court (Criminal Division) has been paid. Upon these grounds alone, the Tribunal upholds the Registrar's Proposal and Orders and Directs that he refuse to renew the registration of the Applicant James E. Tait, as a registered Mortgage Broker (or to forthwith revoke the same as the case may be).

In respect to the second reason advanced in the said Proposal, to wit,

I am of the opinion that the past conduct of the Registrant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty,

the Tribunal is also of the opinion that the evidence adduced before it is sufficient to support this ground for revocation for refusal to renew as well. We accept as proven that the Applicant has been convicted in the Criminal Court of a serious offence under the Income Tax Act and accordingly we find that he has disregarded the law and failed to conduct his affairs with integrity and honesty. The Tribunal accordingly Orders and Directs that this registration be refused or revoked on this ground as well.

At the time of the attendance by the Registrar's Compliance Officer, Mr. Reese, upon the Applicant at Peterborough, we find that the Applicant's conduct was totally unacceptable and demonstrated a lack of integrity if not indeed, of honesty. We find some doubt that the Applicant maintained proper books and records in accordance with the requirements of the Act.

As for the involvement of Paul MacInroy in the operations of the Applicant, he has not been present at this hearing and we consider it unnecessary to comment upon that aspect of the case for the purposes of the Tribunal's present decision. Nor do we find it necessary to rule on the question of whether this registration lapsed at any point prior to the present time by operation of law or otherwise.

This unanimous decision and reasons therefor were orally given at the conclusion of the hearing in the presence of the other two members who concurred.

ALDERCREST DEVELOPMENTS LIMITED

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN
REFUSING A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
DON MacFARLANE, MEMBER

COUNSEL: JOHN H. ARCHIBALD, acting as Agent for Applicants
BRIAN M. CAMPBELL, representing the Respondent

HEARING

DATE: February 3, 1981.

BY VIRTUE OF THE AUTHORITY vested in it under the Ontario New Home Warranties Plan act, the Tribunal, having read the undertaking of the Applicant Corporation orders as follows:

1. That the Proposal of the Registrar dated December 23, 1980 be upheld; the renewal of registration be refused, unless Aldercrest Developments Limited pays to the Program by certified cheque the sum of \$12,000 within 15 days of todays date.
2. If said payment is affected as per paragraph (1), the registration of Aldercrest is to continue as per the provisions of the Ontario New Home Warranties Plan Act.

HARRY AND JACQUELINE BRUCE

APPEAL FROM A DECISION OF THE CORPORATION UNDER
THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REFUSE A CLAIM FOR BREACH OF WARRANTY.

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
JOHN C. HURLBURT, MEMBER

COUNSEL: NORA SANDERS representing Applicants
BRIAN M. CAMPBELL representing Respondent

REASONS FOR TRIBUNAL DECISION AND ORDER

The claim is in respect of certain windows which were subject to condensation of water resulting in sills, drapery and carpeting being affected. When the problem appeared, the claimant Harry Bruce replaced the windows at a cost of \$680.91. He sold the windows that were replaced for \$225.00 so that there is a difference of some \$455.00.

A claim was made for the sum of \$680.91 based on an assertion that a lack of a vapor barrier caused the problem. After correspondence over a lengthy period of time, by letter of the 29th of October, 1979, the Program stated "it would appear that the windows that were replaced by your client were in fact defective, and the Program is prepared to honour his claim on this item."

It would appear the result of becoming aware that a problem existed with other windows, the Program had an inspection made on January 15, 1980. On the 5th of February, 1980, by letter reaffirmed on March 27th, 1980, the Program refused the claim for the reason that the condensation resulted from "excessive humidity in the house" reiterated as due to "excessive levels of humidity."

The claimant's claim is now made on a submission that "the reversal of the HUDAC decision was improper and unfair."

The warranty which is the basis of the claim herein is set out in Section 13 of the Ontario New Home Warranties Plan Act 1976 with relevant provisions being:

"Every vendor of a home warrants to the owner

(a) that the home

- (1) is constructed in a workmanlike manner, and is free from defects in material,
- (11) is fit for habitation, and
- (111) is constructed in accordance with the Ontario Building Code."

It is clear that the claim does not come within the provisions of (11) and (111). To succeed, there must be a negative finding in respect of (1) that the home "is constructed in a workmanlike manner, and is free from defects in material."

The claimant has not demonstrated the claim as coming within the provision of 13.(1)(a)(i); the Tribunal finds that the installation of the kind of windows which were installed is not a breach of clause (i). The Tribunal finds that the problem was not caused by a lack of a vapor barrier, but that the problem is indigenous to the kind of windows that were installed. Accordingly, there is no breach of warranty and there is no entitlement to the claim. It is a conclusion that the Tribunal has come to, based upon its obligation to deal with the matter in accordance with the Statute.

However, the Tribunal is constrained to note the following:

1. The course of conduct of the Program in first saying that it would pay the claim, using the words 'honour the claim', and then reversing its position is, if not legally improper and unfair, one that can so be described in layman's language and one that undermines the credibility of the Program. The replacement of the windows took place before the Program's acceptance of responsibility and so it cannot be said that the claimant was misled into making the expenditure. The Tribunal notes also that in the summary of reasons for requesting the hearing, it is stated "that the old windows had been sold because Mr. Bruce had been informed that a decision had already been made"; that is not in conformity with the facts as they emerged before the Tribunal.

2. The reason set out in the refusal letter is far short of what it should have been. There is no evidence placed before the Tribunal that humidity in the home was excessive. The letter should have stated, the refusal to be based on, or at least on the alternative, that the problem was due to the kind of window that was installed, as explained by Mr. Nelligan. Information and experience in this regard was available to the Program and in the ordinary course should have been included in the letter. However, the Tribunal finds that the claimant was

not prejudiced in his claim as put forth, by an interpretation of the Corporation's position.

The Tribunal states that if it had an unfettered discretion, which it does not have, it would award the claim subject to the deduction of the amount received on sale. Further, the Tribunal states, that under the circumstances of the dealing with this claim, if it had the power to do so, which it does not have, it would award costs to the claimant. It may be that the Program will review whether under the circumstances, though not bound to do so by law, it can compensate the claimant herein to some degree or in some fashion.

The Tribunal by virtue of the authority vested in it under the Ontario New Home Warranty Plan Act 1976 directs HUDAC New Home Warranty Program not to pay the claim.

The decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the two Members who concurred.

JOHN AND VIOLET BUXTON

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT, 1976
TO REFUSE A CLAIM

TRIBUNAL: J. YAREMKO, Q.C., CHAIRMAN
H. MORNINGSTAR, MEMBER
D. MacFARLANE, MEMBER

COUNSEL: PAUL J. DeVILLERS representing the Applicants
PATRICIA HENNESSY representing the Respondent

DATE OF
HEARING: August 14, 1981

REASONS FOR DECISION AND ORDER

The Applicant's claim is based on there being "major structural defects in his home within the meaning of Section 13 (1) (b) of the Ontario New Home Warranties Plan Act, 1976 as defined in Ontario Regulation 943/76 because he has a defect in workmanship or materials that materially and adversely affect the use of his building for the purpose for which it was intended."

The Tribunal finds, and indeed there is no dispute, that there is an extensive defect within the exterior sheathing, in that the same was damaged in some fashion during the course of construction. The Tribunal finds further that there is considerable condensation on the inside of the drywall leading to its substantial deterioration, particularly along the exterior west wall. However, the Tribunal is not able to find that there is any relationship between the presence of the damaged exterior sheathing and the condensation on the interior of the drywall. Though it is obvious that the condensation is brought about by the presence of moisture within the dwelling, the cause of the presence of that moisture to the degree that appears to be in existence has not been established nor has the factor that brings about the phenomenon of the condensation.

The Tribunal finds that the exterior sheathing is not a load-bearing portion of the building; indeed it is not a requirement of the building code. The Tribunal finds that

there is no defect in workmanship or materials placed in evidence before it which has resulted in the failure of the load-bearing portion of the building or materially and affected its load-bearing function or that has materially and adversely affected the use of the building for the purpose for which it was intended.

Further, if there had been such a specific finding; the Tribunal is of the opinion that the same would come within the exclusion set out in the definition set out in paragraph (m) i.e., "dampness not arising from failure of a load-bearing portion of the building" for as the Tribunal has found, the exterior sheathing does not perform a load-bearing function.

The legislation is very specific as to the extent of the protection which is given; the Applicant must bring himself within the framework of the warranties which are given in accordance with the Act. The Tribunal is sympathetic to the position of Mr. and Mrs. Buxton and would hope that some of the comments which have emerged during the course of the hearing which relate to other than the kind of work that is envisaged in the estimates, and suggestions that have been made may be of some assistance. However, unless the Applicants can somehow bring themselves within the meaning of major structural defect before the five-year period expires, they will continue to have no recourse against the Corporation.

Based on these findings, the Tribunal directs the Corporation not to pay the claim.

The decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

GEORGE AND PAULINE DONOVAN

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN
REFUSING A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
JOHN HURLBURT, MEMBER

COUNSEL: PAULINE DONOVAN, Agent for the Applicants
BRIAN M. CAMPBELL, representing the Respondent

HEARING
DATE: January 6, 1981

BY VIRTUE OF THE AUTHORITY vested in it under the Ontario New Home Warranties Plan Act, The Tribunal finds upon the evidence that this claim has not been established and must therefore fail.

The Tribunal accordingly directs the Corporation not to pay the claim.

DURHAM CONDOMINIUM CORPORATION NO. 56

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED
TO ADMINISTER THE ONTARIO NEW HOME WARRANTIES PLAN
ACT, 1976
TO REFUSE A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOU RICE, MEMBER

COUNSEL: WILLIAM C. NEWTON, agent for the Applicant
BRIAN M. CAMPBELL, representing the Respondent

MEETING
DATE: July 28, 1981

REASONS FOR DECISION AND ORDER

The Tribunal has reached a decision upon the question of its jurisdiction to hear this appeal. The decision is based on law and upon the facts as they were presented in evidence.

The law which governs our decision is set out in Section 9a(7) of the Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario 1970 as amended, and reads as follows:

Notwithstanding any limitation of time for the giving of any notice requiring a hearing by the Tribunal fixed by or under any Act, and where it is satisfied that there are prima facie grounds for granting relief and that there are reasonable grounds for applying for the extension, the Tribunal may extend the time for giving the notice either before or after expiration of the time so limited, and may give such directions as it considers proper consequent upon such extension.

We would refer, as we did a few moments ago before we recessed, to certain key words and to the import of those words as the Tribunal interprets the same, and these are the words "and" which appears immediately following the words "prima facie grounds for granting relief" as well as the word "may" where it appears immediately following the words "giving the notice Tribunal". As we interpret the word "and", just

mentioned, the import of it is that there must be both *prima facie* grounds for granting relief and also reasonable grounds for applying for the extension. Both of those factors are essential. The word "may" implies, and carries with it a discretion to this Tribunal. In other words, the Tribunal may extend the time or it may not, depending on its discretion. Its discretion is to be exercised according to whether or not it feels that both of the factors referred to are present. That's the law as the Tribunal finds it.

The facts of this case are as follows:

1. A claim was made by the Applicant (that is to say Durham Condominium Corporation #56) pursuant to the Ontario New Home Warranty Plan Act. This claim was a claim for relief as provided by the Act.

2. That claim was reviewed and subsequently rejected by the Warranty Program. Notice of such rejection consisted of the letter dated November 24th, 1980, which has been entered in evidence as Exhibit #12.

3. The final paragraph of that letter reads as follows:

" In closing, however, you are entitled to appeal our decision if, within 15 days, you notify both the Commercial Registration Appeal Tribunal and the Registrar of the Warranty Program that you require a hearing."

4. The Applicant did not comply with the requirement of law, which is contained in Section 9 of Subsection 2 of the New Home Warranty Plan Act, and which was set out in the final paragraph of Exhibit #12 as just quoted, that the notice of appeal commonly referred to as a request for a hearing be lodged with the Registrar of the Warranty Program as well as with this Tribunal within the 15 day period specified (and which has been referred to as the "15 day deadline").

The Applicant has today requested the Tribunal to exercise its discretion and to grant an extension of that 15 day deadline.

Mr. Newton has testified that this non-compliance with the 15 day deadline requirement was due to certain internal procedural problems of the Condominium Corporation and also in its relationship with his corporation which is the management corporation. Upon the evidence the Tribunal is not satisfied

that these difficulties, as explained by the witness for the Applicant, constitute "reasonable grounds for granting an extension" as requested. The request for an extension is therefore, denied.

Accordingly, the Tribunal must decline to hear this appeal upon the grounds that it has not been properly brought and in accordance with the provisions of the law as relating to the same and as set out in Section 9 of the Ontario New Home Warranty Plan Act, or under the terms of the Ministry of Consumer and Commercial Relations Act, Section 9a(7).

We would add that the provisions of the statutes cited were enacted by the Legislature, in its wisdom, to the benefit of all the citizens of this province in such a way as to assist in the free and proper conduct and operation of business. Were the Tribunal to interfere with these clearly expressed provisions of the law, without palpably good reason for so doing, we conceive that the result would be to make that which is clear unclear and that which is certain uncertain with a resulting disservice to the community and to the whole atmosphere in which business is done.

The Tribunal therefore dismisses this application for relief upon the grounds that it has not been brought within the proper time. The decision over the Warranty Program to refuse the Applicant's claim herein is therefore, by this order, confirmed.

PETER FEDIASH

APPEAL FROM DECISION OF THE CORPORATION DESIGNATED TO
ADMINISTER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
REFUSING A CLAIM

BEFORE: MATTHEW SHEARD, VICE-CHARMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
L. RICE, MEMBER

COUNSEL: PETER FEDIASH in person
BRIAN M. CAMPBELL representing the Respondent

HEARING
DATE: May 28th, 1981

REASONS FOR DECISION AND ORDER

The Decision of the Tribunal is that it has not been established that there has been a defect of workmanship or material resulting in a failure of the load-bearing portion of the subject building that materially and adversely affects the use of that building for the purpose for which it was intended. The claim simply does not fall within the extended warranty. Had it been brought within the first year it well might have succeeded but in these circumstances in which it has been brought, it must fail.

The Decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who unanimously concurred.

FRANK AND JOIE GOLD

APPEAL FROM DECISION OF THE CORPORATION DESIGNATED
TO ADMINISTER THE ONTARIO NEW HOME WARRANTIES PLAN
REFUSING A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
STEPHEN PUSTIL, MEMBER
HELEN J. MORNINGSTAR, MEMBER

COUNSEL: FRANK GOLD in person and Agent for the Applicants
BRIAN M. CAMPBELL representing the Respondent

HEARING
DATE: January 8, 1981

BY VIRTUE OF THE AUTHORITY vested in it under the
Ontario New Home Warranties Plan Act, the Tribunal finds upon
the evidence that this claim has not been established and must
therefore fail.

The Tribunal accordingly directs the Corporation not
to pay the claim.

DONALD R. HARGRAVE AND EARLINE J. HARGRAVE

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT, REVISED STATUTES OF ONTARIO,
1980, CHAPTER 350

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
STEPHEN PUSTIL, MEMBER

COUNSEL: DONALD R. HARGRAVE, appearing in person
BRIAN M. CAMPBELL, representing the Respondent

HEARING November 12th, 1981
DATE:

REASONS FOR DECISION AND ORDER

There has been no evidence before us this morning of a "major structural defect" as defined by the Ontario New Home Warranty Plan Act and its Regulations and by the previous decisions such as to enable us to allow this claim. The present claimant has impressed the Tribunal as a transparently honest and candid person and he has our complete sympathy. We regret our inability to be of any assistance to him and his co-claimant. But in the circumstances and having regard to the existing legislation this claim must be disallowed.

The decision and reasons therefore were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

PATRICK A. LACELLE

APPEAL FROM DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN
REFUSING A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
WALTER FUNK, MEMBER

COUNSEL: NO ONE appearing for the Applicant
BRIAN M. CAMPBELL for the Respondent

HEARING
DATE: July 30, 1981

BY VIRTUE OF THE AUTHORITY vested in it under the Ontario New Home Warranties Plan Act, The Tribunal finds that the Applicant was given NOTICE PERSONALLY OF THE Appointment for Hearing for the 30th of July, 1981, as evidenced by Exhibits 3 and 4.

Upon the Applicant failing to appear to pursue his claim, the Tribunal directs the Corporation not to pay the claim.

THOMAS W. LACROIX

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT, 1976
REFUSING A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: THOMAS W. LACROIX in person

BRIAN M. CAMPBELL representing the Respondent

HEARING

DATE: August 20th, 1981

REASONS FOR DECISION AND ORDER

The Tribunal finds that the extended coverage afforded by the Ontario New Home Warranties Plan Act, that is to say the additional four years of coverage which is the coverage in respect of which the present claim has been brought, applies only to major structural defects as defined in the Act and its regulations, as well as upon the basis of previous decisions of this Tribunal. The present Claimant has failed to prove the existence of such a major structural defect, a structural defect which would result in the failure of a load-bearing portion of his home or which materially and adversely affect the load-bearing function of any part of his home such as might render that home susceptible or imminently susceptible to collapse or otherwise uninhabitable. The purpose of this building is to provide a home for the claimant and his family which is what it is doing and is likely to continue to do provided it is properly maintained which is, of course, the function of the claimant as owner and not, at this time or stage, that of the Warranty Program. The claim therefore must be disallowed and the Tribunal Orders accordingly.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

GEOFFREY A. McNAMEE

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT
TO REFUSE A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
D. J. MacFARLANE, MEMBER

COUNSEL: MALCOLM M.R. SEHEULT, representing the Applicant
PATRICIA HENNESSY, representing the Respondent

DATE OF
HEARING: November 24, 1981

REASONS FOR DECISION AND ORDER

This has been a claim on the warranty given under the Ontario New Home Warranties Plan Act based on an alleged major structural defect in the claimant's house, situate at 483 Sparling Crescent, Burlington, Ontario, possession of which was taken by him on May 17th, 1976. It was alleged that this defect was comprised of a certain crack in one of the bearing walls as referred to in the evidence. The warranty given under this Act set out in Section 13 of the same which reads in essential part for the purposes of this case as follows:

"Every vendor of a home warrants to the owner that the home is constructed in a workmanlike manner and is free from defects in material that it is fit for habitation; and that it is constructed in accordance with the Ontario Building Code."

The warranty further provides the home shall be free of major structural defects as these are defined by the regulations. There are exclusions however, to Section 13 and they are set out in Subsection 2. The exclusions to which we have been specifically referred for purposes of this particular case are at Subsection (d) of Subsection (2): "normal shrinkage of

materials" and so on, and Subsection (f) - "damage resulting from improper maintenance", and also Subsection (h) - "subsidence of the land around the building" and so on. What is meant by the term "major structural defect" in the context of this warranty is to be determined from Subsection (m) of Section 1 of Part 1 Bylaw #R-2 of the Regulations to the Ontario New Home Warranties Plan Act and that subsection says "major structural defect" is any defect in workmanship or materials which result in the failure of the loadbearing portion of the building and adversely affects its loadbearing function or which materially and adversely affects the use of such building for which it was intended including major cracks in basement walls.

In the opinion of the Tribunal the present problem in this case is not the result of poor materials or poor workmanship. We believe that the problem at the present time is quiescent and we believe that whatever measure or measures may be necessary to effect its cure, if any are necessary, will be the responsibility of the owner. The Tribunal's decision is based upon the evidence which has been set before us and that decision is that this claim must fail. The decision of the Corporation from which this appeal has been brought is therefore upheld.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

E.H. SCARABELLI (1975) INC.

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT, 1976
REFUSING A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON EVANS, MEMBER
JOHN C. HURLBURT, MEMBER

COUNSEL: ROBERT C. McLAUGHLIN representing the Applicant
BRIAN M. CAMPBELL representing the Respondent

HEARING September 2, 1981
DATE:

REASONS FOR DECISION AND ORDER

There is a good deal less to this case than met the eye, or the ear, at the hearing of it. Essentially the facts are as follows. E. H. Scarabelli (1975) Inc., is in the electrical contracting business and its president and major shareholder is E. H. Scarabelli. This company had a contract to do electrical work for Marvo Construction Limited in consequence of which, as of August, 1978, Marvo owed the Scarabelli Company some \$75,000.00.

Marvo was one of three corporate partners in the corporate partnership which carried on business under the name of The El-Mar Group (1978) and which built and offered units for sale in an unregistered condominium development at 3505 Uplands Drive, Ottawa, known as Huntview (or Huntsvieview) Estates. This was not the property in respect of which the \$75,000.00 debt had arisen. On August 30, 1978, the Scarabelli Company entered into an agreement providing for the sale to it by The El-Mar Group (1978) of Unit 55 in the said Huntsvieview Estates for the sum of \$54,900.00 payable \$500.00 as a "cash deposit" and the full balance of \$54,400.00 as a "down payment". This "down payment" took the form of a "credit note" (Exhibit 9.10) whereby, it was said, the amount owing by Marvo to the Scarabelli Company was reduced by the amount of the credit which the note evinced. (The sum of \$54,900.00 appears on the face of the note, not \$54,400.00, but this seems to be an error.) Mr. E. H. Scarabelli testified that his company took possession of the apartment or unit on September 1, 1978 and that his son lived there for approximately seven or eight months after which it was leased out to "a group of fellows" for one year. No occupancy fee or rent was paid during the

period, he said, nor was any other claim made. In November, 1979, before title could be conveyed to the Scarabelli Company, the mortgagee having taken power of sale proceedings, title to the unit passed to C.M.H.C. and the Scarabelli Company lost any right to acquire it. On November 30, 1979, The Scarabelli Company, having on August 30th, 1978, received a Certificate of Completion and Possession, a Deposit Receipt and a Warranty Certificate pursuant to the Ontario New Home Warranty Plan Act, filed with the respondent a Proof of Claim Form together with supporting materials consisting of a copy of an Agreement of Purchase and Sale, the Deposit Receipt, a copy of a cancelled cheque for the \$500.00 cash deposit, a copy of the aforementioned Credit Note and a statement of occupancy. The claim which was made was for payment from the guarantee fund of the sum of \$20,000.00 (the maximum amount payable on any individual claim) by reason of a loss of the \$54,900.00 said to have been deposited. On January 20, 1980, the Respondent rejected this claim in a letter over the signature of Ian H.H. Johnson, Claims Manager, on the grounds that the loss in question was a result of contractual dealings between the claimant and Marvo and that the Warranty Programme was not liable for an account receivable between builder and sub-contractor. From that decision the claimant has appealed to this Tribunal.

The Ontario New Home Warranty Plan Act and the compensation fund it established exist to protect purchasers of new homes. It is "consumer legislation". Its purpose is quintessentially to protect the public of Ontario from some - as many as it can - of the risks, losses and injuries which are inherently possible in the congress which occurs between members of the public who get involved in the acquisition of new homes and those who engage in the business of providing these. In order to succeed in an application for compensation from the fund the claimant must satisfy the corporation designated under the Act that he falls within the ambit of its protection, that he is, if you please, a member of the flock or fold intended to be protected and not just some wolf or perhaps a clever fox masquerading in the clothing of a sheep.

In the instant case, certain questions arise. One of these is how did the claimant get involved with Marvo, or the partnership El-Mar of which Marvo is a member, in the first place. The answer seems to be that Marvo and Scarabelli had dealings together as builder and sub-contractor and from that inter-relationship money came to be owing from the one to the other and it seems from what we have heard that the electrical contracting firm may have felt, and with good reason, that the builder was in serious financial difficulties and that the monies owing to the former by the latter might never be paid.

In such circumstances, it would seem plausible that the sub-contractor creditor would try to find some way to secure his position.

The next question is why did the Claimant acquire this new home. Did the Claimant in consequence of the manoeuvres with pieces of paper which have been described actually become an "owner" as defined at Section 1(g)? I.e., did it become "a person who firsts acquires a home from its vendor for occupancy"? Was occupancy its primary purpose? Or was its primary purpose protection of a trade debt? This is a question of fact relating to intention the answer to which can only be inferred from the context of the transaction of acquisition or "purchase" as revealed by the evidence presented. The witness Scarabelli told us that the apartment was first occupied by his son for seven or eight months and later leased out to "some fellows". Further and more detailed information upon the nature of this occupancy might have been helpful but from what we have learned it seems at least highly believable that the claimant's primary intention was to secure protection rather than accommodation. Had it been otherwise the Claimant ought to have brought clear and convincing evidence to that effect.

Counsel for the Claimant argued that the credit note given to the vendor by the Claimant produced a novation, that the giving and receiving of that note forever barred the Claimant from recovering the sum stipulated upon its face, that this operated to extinguish the prior debt for all time like the giving of some absolute and irrevocable consideration. We find no evidence of this. In our opinion the credit note, being the evidence of a partial extinction of a prior existing debt, was given in consideration of the benefit passing to the present Claimant as a purchaser under a purchase and sale agreement, which agreement, of course, was an agreement under which the purchaser was to receive title to the subject condominium apartment by conveyance. But the vendor failed to convey, the purchase and sale agreement was never performed, and surely had the purchaser sued, the Court would have ruled that the purchaser (the present Claimant) was entitled to have back its credit note and with it the benefit of which it had, in giving the note, purported to divest itself. The Claimant is asking the Tribunal to find that the Court would have found otherwise, found that the consideration represented by the credit note would not have been refundable to the Claimant notwithstanding that the deal had fallen through. The Tribunal rejects this proposition. The Tribunal finds that there was no novation. In our view only if the transaction had closed and title passed could the prior debt have been extinguished.

The Tribunal finds that the Claimant has failed to establish its claim, which is a claim that it sustained a loss resulting from the vendor's failure to perform the contract of conveyance as referred to. If the Claimant has sustained a loss it results from a bad debt which is in no way recoverable from the Guarantee Fund established by the Ontario New Home Warranty Plan Act. It was never, in the Tribunal's opinion, the intention of the Legislature that such debts should be so recoverable from that fund, and indeed the Tribunal conceives that it is the duty of those who administer the fund to protect it from improper advances.

The Claimant's counsel produced an extensive argument concerning the possibility that some or all of the regulations to the Act may be ultra vires. This was an interesting exercise or display of forensic virtuosity but has no relevant bearing we can detect upon the essential problem presented by this case, the problem of satisfying the Tribunal that the decision to reject this claim for the reasons stated above is in error. The Tribunal concurs with the respondent's decision in rejecting this claim on the grounds that the loss sustained by the Claimant was essentially a business loss and accordingly is an improper claim and in no way recoverable from the Guarantee Fund established under the Ontario New Home Warranty Plan and by this Order affirms that decision and Directs that the claim be rejected and disallowed.

VICKI LYNN SCOTT

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTY PROGRAM
TO REFUSE A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
JOHN C. HURLBURT, MEMBER

COUNSEL: H.G.H. RAWDING representing the Applicant
BRIAN CAMPBELL representing the Respondent

HEARING
DATE: September 23rd, 1981

REASONS FOR TRIBUNAL RULING
RE REQUEST FOR AN EXTENSION OF TIME

The Tribunal has been requested to extend the time for giving the notice requiring a hearing by the Tribunal in this matter.

It is accepted that notice of the decision of the Corporation is set out in Exhibits 7a and 7b), 7b being dated the 11th day of September 1980. The request for a hearing by the Tribunal is set out in Exhibit 1, a letter dated March 9, 1981 received by the Tribunal March 10th from H. G. Rawding on behalf of the claimant.

Relevant sections in the matter are set out in section 16 of the Ontario New Home Warranties Plan Act as follows:

- 1) Where the corporation makes a decision under section 14, it shall serve notice of the decision together with written reasons therefor, on the person or owner affected.
- 2) A notice under subsection 1 shall inform the person served that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under subsection 1 is served on him, notice in writing requiring a hearing to the Corporation and the Tribunal, and he may so require such a hearing.

I italicize the words "A notice under subsection 1 shall inform the person served that he is entitled to a hearing" and the words "if he mails or delivers within 15 days after the notice under subsection 1 is served on him". Reference to both 7a and 7b shows that the Notice of the decision has not contained the information (two provisions) italicized by me.

The position taken by the Program is that the notice requiring the hearing has not been mailed or delivered within the time prescribed by section 16(2).

Section 9(a)(7) of the Ministry of Consumer and Commercial Relations Act provides:

"Notwithstanding any limitation of time for the giving of any notice requiring a hearing by the Tribunal fixed by or under any Act, and where it is satisfied that there are prima facie grounds for granting relief and that there are reasonable grounds for applying for the extension, the Tribunal may extend the time for giving the notice either before or after expiration of the time so limited...."

The Tribunal is of the opinion that the two shortcomings in the Notice of decision and in particular, the bringing to the attention of claimant that the requirement for hearing be made within 15 days after the notice under section 1 is served provides the claimant for reasonable grounds for applying for the extension. Accordingly, it is not necessary for the Tribunal to rule in respect of the position taken on behalf of the claimant that the notice must be served on the person or owner affected and not upon an agent acting on behalf of such person or owner. Further, the Tribunal is satisfied that there are prima facie grounds for granting relief. It has been argued on behalf of the program that the issue involved in this matter has been decided heretofore by the Tribunal. In the light of its finding herein, it will not be necessary for the Tribunal to decide whether the Tribunal is bound by its previous decisions as has been its practice. The solicitor for the corporation has referred to the decision in the Stathakis case, followed in the Pastore case. The solicitor for the claimant has raised an important point of law that the limitation set out in Regulation 61, (more specifically: "who does not become an owner") is beyond the power of the program. This issue was not raised nor argued before the Tribunal either in the Stathakis case or in the Pastore case. The solicitor

for the program has referred to McDonagh and Palmerio but the Tribunal is of the opinion the issue there is to be distinguished from the issue raised by the solicitor for the claimant. The Tribunal is of the opinion that the claimant comes within section 14(1)(a) of the Act and has raised an issue to which the Tribunal may be required to direct its specific attention.

The Tribunal grants the application for the extension of time, and rules that the Exhibit 1 be sufficient within the meaning of the section 16, subsection 2 of the Ontario New Home Warranties Plan.

The above ruling and reasons therefor were orally given by the Chairman in the presence of the other two members.

VICKI LYNN SCOTT

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT, 1976
REFUSING A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
JOHN C. HURLBURT, MEMBER

COUNSEL: H.G.H. RAWDING representing the Applicant
BRIAN M. CAMPBELL representing the Respondent

HEARING September 23, 1981
DATE:

REASONS FOR DECISION AND ORDER

On August 21, 1978, the applicant entered into an agreement of purchase and sale with 353581 Ontario Limited to purchase a new home for \$55,900 upon the following terms: \$500 as a deposit, \$25,000 (decreased from \$25,900) by a mortgage at 10.625% per annum for 5 years; \$5,400 (increased from \$4,500) on possession and \$25,000 cash when registration was completed. It is to be noted that the interest payable under the first mortgage would amount to \$12,810.97.

Before the transaction could be consummated, however, Fidelity Trust Company, mortgagee, commenced power of sale proceedings against the vendor corporation. On 24th of March, 1980, the applicant entered into a second agreement of purchase and sale for the same home with Fidelity Trust. The purchase price for the second transaction was \$50,000 all cash.

The agreement for sale called for completion on the 23rd day of April, 1980.

The applicant raised the additional \$25,000 to make the cash purchase as follows:

- \$20,000 by way of a first mortgage at 15% for 3 years. The interest for the three years, and for a further two years at 15% interest would amount to \$14,307.88.

- \$5,000 by way of a loan from the Permanent at 19%. The interest on the loan paid in 1980 amounted to \$344.17.

Sometime prior to February 25th, 1980, the applicant made a claim against the Corporation. A proof of Claim form was sworn to by the Applicant on the 10th day of March, 1980 and documentation with respect to the claim was filed with the Program on the 22nd of April, 1980.

By letters dated July 15th and September 11, 1980, the Corporation refused the claim.

Counsel for the Corporation resisted the claim as follows:

There was no proof of the payment of \$5,400 asserted to have been paid as deposit additionally to \$500; if such payment of \$5,900 as deposit were established, there had been a benefit of \$5,900 to the applicant in that the final purchase price was \$5,900 less so that the applicant had suffered no loss as a result of the builder's fault.

The Tribunal finds that there had been deposits made of \$5,900 - made up of \$500 and \$5,400 which latter sum is contained in a payment made to the vendor corporation within the sum of \$5,853.33 paid upon the possession date. The Tribunal finds that the sum of \$353.33 of the \$5,853.33 was paid for adjustment of items prepaid by the vendor for which he was entitled to a refund.

The Tribunal finds that there has been benefit to the applicant under the final purchase:

Section 14(2) of the Act states:

"(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source."

The Tribunal is of the opinion that the benefit to be taken into consideration in this instance is the net benefit, ie., the true benefit accruing to the applicant. The agreement which provided for a reduction in price of \$5,900 required

total cash consideration. This meant that the applicant had to arrange for an interest expense which was greater than under the agreement with the vendor corporation. The Tribunal is of the opinion the benefit of \$5,900 is in effect reduced by the liability for the additional interest.

The Tribunal is of the opinion that the additional legal fee of \$187.00 is not to be offset as against the benefit obtained.

The true benefit is the \$5,900 - \$1,901.08 (made up of \$1,556.91 additional interest owed under the new first mortgage and extension thereof for 2 years plus \$344.17 interest paid to the Permanent) i.e. \$3,998.92

The Applicant accordingly has suffered a loss of deposit of \$5,900 less a benefit of \$3,998.92 i.e. \$1,901.08 which the Tribunal directs the Corporation to pay to the applicant.

KARTAR SINGH

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT, 1976

REFUSING A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
JOHN C. HURLBURT, MEMBER

COUNSEL: KARTAR SINGH in person

BRIAN M. CAMPBELL for the Respondent

DATE OF
HEARING: June 23, 1981

REASONS FOR DECISION AND ORDER

This hearing has been held to consider a claim against the compensation fund established under the Ontario New Home Warranty Plan Act. The Claimant, Mr. Singh, has alleged that certain defects exist in his house which is a house warranted under the Act and he desires that these be rectified at the expense of the compensation fund.

Counsel for the Warranty Program has brought a motion for a "non-suit", that is to say, for a finding by the Tribunal that the Claimant has failed to establish his claim or to have established sufficient evidence in support of this claim to render it necessary for the Warranty Program to offer evidence in defence of its decision to refuse the claim. In support of his contention that the claim fails for lack of prima facie proof, counsel for the Warranty Program alleges that notice of the claim was not given in compliance with the requirements of the law set out in the Statute.

This is an important point which the Tribunal is glad to have an opportunity to settle in certain terms.

Claims arising against the fund - unless they are claims for major structural defects, which these are not nor has it been alleged that they are - must be brought within one year. In this case, we find the one-year period commenced at the end of October, 1978. We find that the builder may have been notified of Mr. Singh's complaints by a letter bearing the

date of May 12, 1979 and entered as Exhibit 7, but we find that no complaint was made to the Warranty Program until the time the Warranty Program received Mr. Singh's letter of September 30, 1980 which is stamped 'RECEIVED OCTOBER 2, 1980.' That letter was entered as Exhibit 6A.

Section 13(4) of the Ontario New Home Warranty Plan Act reads as follows:

A Warranty under subsection 1 applies only in respect to claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

Regulation 4(1) of the Statute reads as follows:

Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

The Tribunal finds the requirements of Section 13(4) and Regulations 4(1) are not satisfied by the mere notification of the builder within the one year period. Notification of the builder is not constructive notification of the Warranty Program sufficient to render the compensation fund liable.

Consequently, the present claim against the compensation fund must fail on that ground alone - upon the ground that it was not brought adequately to the notice of the Warranty Program within the time delimited by law - and the Tribunal accordingly orders that the motion brought on behalf of the Program be granted, and that the present claim be dismissed.

The decision and reasons therefor were orally given at the conclusion of the hearing in the presence of the other two members who unanimously concurred.

384654 ONTARIO LIMITED

(Antonio Colacicco, Giovanni Pacitti, and Antonio Pacitto)

APPEAL FROM DECISION OF THE CORPORATION DESIGNATED
TO ADMINISTER THE ONTARIO NEW HOME WARRANTIES PLAN
REFUSING A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY SINGER, MEMBER
DON MacFARLANE, MEMBER

COUNSEL: BRIAN M. CAMPBELL representing the Respondent
NO ONE appearing for the Applicant

HEARING

DATE: August 4, 1981

REASONS FOR DECISION AND ORDER

The Applicant is a corporation and was originally registered under the Ontario New Home Warranty Plan Act in October 1978 upon the condition that its financial adequacy or responsibility be guaranteed by its principals, Messrs. Antonio Colacicco, Giovanni Pacitti and Antonio Pacitto and upon the further condition that the financial responsibility of the said guarantors be established by statements of their individual net worths acceptable to the Registrar.

The Tribunal holds that these conditions were properly imposed by the Warranty Program through operation of Regulation 9(3)5 of the Regulations enacted under the said Act. Such statements were, in fact, lodged with the Registrar of the Warranty Program at the time of the Applicant's original registration and they are dated October 1977.

Since then, however, no evidence has been lodged with the Warranty Program as to the financial positions of the guarantors as they have or may have varied or developed during the intervening years.

An application for renewal of the Applicant's registration was due January 18, 1981 and has been received. It was supported by a financial statement of the Applicant company for the year ending May 31, 1980, but such statement was not satisfactory because it failed to satisfy the Registrar of the Warranty Program that the said Applicant corporation had sufficient means either to be or to be likely to be financially

responsible in the conduct of its business affairs during the period in which the renewal of its registration was sought. The guarantee of the aforementioned guarantors would, therefore, have been the sole basis upon which the registration could have been renewed so far as financial responsibility was concerned and despite repeated requests no up-to-date evidence of the guarantors' current financial position, of their financial responsibility or otherwise, has been supplied to the Warranty Program or its Registrar.

In these circumstances the Tribunal feels that the request for renewal of the Applicant's registration cannot be granted since there is no evidence at all that the guarantors are currently financially responsible; it would be very hazardous to do so and would amount to an unacceptable practice. The Registrar's proposal is therefore upheld and the Tribunal orders and directs the Applicant's application for renewal of its registration as a builder/vendor under the Act be refused at this time.

The Decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who unanimously concurred.

RENEE WILLIAMS

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT
REFUSING A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY SINGER, MEMBER
STEPHEN PUSTIL, MEMBER

COUNSEL: NORMAN F. WILLIAMS representing the Applicant
BRIAN M. CAMPBELL representing the Respondent

HEARING July 20th, 1981
DATE:

REASONS FOR DECISION AND ORDER

This was a claim against the guarantee fund established under the Ontario New Home Warranties Plan Act. The claimant had purchased a new home from a registered builder with whom she had earlier made a contract of construction and sale. She had gone into possession and presumably paid all or most of the purchase money before the construction of the home was fully completed in conformity with the precise details of the contract which had particularized many special features which the home was to have such as certain built-in bookshelves and decorative shutters. The builder went bankrupt. The claimant, as owner in possession, moved for relief from the Corporation. Two successive inspections of the premises were made. The Corporation accepted responsibility for a good many of the deficiencies complained of and these items were either completed or repaired under the Warranty Program at the expense of the guarantee fund. Other items were either attended to by the claimant herself or her claims in respect of these were otherwise dropped by her. The purpose of this hearing was to consider certain claims in respect of other outstanding items which have been mentioned in either or both of the conciliation reports and for which the Corporation had refused to accept responsibility on the grounds that such items were not warranted by it, i.e., that such items were beyond the scope of the warranty given by the Ontario New Home Warranties Plan Act.

Denial of responsibility for two of such outstanding claim items was based on the exclusion from liability provided

by Section 13 (2) (d) which states that the warranty provided by the Act shall not apply in respect of normal shrinkage of materials caused by drying after construction. These were item 3 of the conciliation report based on the inspection made on September 18, 1980 and marked Exhibit 4 and item 6 of the conciliation report based on the inspection made on November 20, 1979 and marked Exhibit 3. Denial of responsibility for the claim which was item 2 of the conciliation report marked Exhibit 4, and which had to do with a patio, was based on Section 13 (2) (c) and (h), viz., normal wear and tear and subsidence. The Tribunal upholds the decision of the Corporation in respect of the above three claim items and confirms that no responsibility or liability exists for them under the Act, for the reasons given.

The Claimant's remaining claims, to wit, items 8, 9, and 13 of Exhibit 4 and items 2, 10, 11, and 12 of Exhibit 3 (item 13 of Exhibit 4 and item 10 of Exhibit 3 being one and the same), being six claim items in all, were denied by the Corporation on the ground that these were beyond the scope of the warranty as defined at Section 13 (1) of the Act. The claimant countered such denial with the interesting argument that, since the items in question had been specified in her contract with the builder/vendor, a contract which that vendor had failed to perform owing to its bankruptcy, she was therefore entitled to have her "financial loss" resulting from such failure of performance paid out of the guarantee fund pursuant, Counsel argued, to the correct interpretation of Section 14 (1) (a) of the Act which reads as follows:

14.-(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Counsel for the claimant argued that inasmuch as the claimant had entered into a contract with the vendor herein for the provision of a home - facts which seemed evident - and had a cause of action in damages against the vendor by reason of the latter's failure to perform the contract by reason of bankruptcy - again facts at least superficially evident - she

was entitled to be paid out of the guarantee fund " the amount of such damage" which, he said, would be an amount equal to her "financial loss resulting" from the vendor's default; or, in other words, an amount equal to the cost of completing or providing the six claim items mentioned in the second paragraph above (subject to such limits as are fixed by the regulations, viz., by By-Law R-4). The claimant did not liquidate her financial loss or request payment out of the fund for a specific money sum, but rather sought an order directing the Warranty Program to complete or provide the outstanding claim items in question. These included the provision of ornamental shutters, bookshelves, two trees, a door in front of a row of shelves and an exhaust fan for the master bathroom, all of which the vendor had contracted prior to its bankruptcy to install for the claimant, as well as a vent to be installed over the kitchen stove which was to be provided by the Claimant.

The principle of this argument appears to be that wherever there has been a contract for the provision of a home between a person and a vendor (both as defined in the Act) which has been in whole or part breached or frustrated by the vendor's bankruptcy and otherwise in accordance with the facts of this case, then that person may claim upon the warranty established under this Act what would amount to specific performance of the contract at the expense of the guarantee fund established thereunder.

Counsel for the claimant illustrated his argument and the effect it would have in his answers to hypothetical questions posed by the Tribunal: if, in this case, the contract had provided for an additional room to be built which had not been started it would be incumbent upon the Warranty Program to provide such additional room at the expense of the fund. If the contract had called for ornamental Spanish tiles, of a special type, for the roof and these were not provided it would be incumbent upon the Warranty Program to provide these at the expense of the fund. In other words, it seems that the claimant's interpretation of Section 14 would result in an obligation upon the Home Warranty Program to ensure that contracts for the provision of homes covered by it should be performed specifically and in exact detail - subject only to such limits as are fixed by the regulations.

The Tribunal finds that this is not so. Section 14 of the Act must be read together with the Act as a whole. The guarantee fund established under the Ontario New Home Warranties Plan Act is a fund to cover the cost or expense of providing the warranty or warranties which are the subject of this legislation. The nature of the warranty provided in this

legislation is to be inferred from a reading of the whole Act as well as its regulations. In particular, Section 13 (1) must be examined:

13.-(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner, and is free from defects in material,

(ii) is fit for habitation; and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

Section 13 (2) goes on to provide a good number of limits to the warranty mentioned in the above Section 13 (1) and these limits of course operate at all times concurrently and additionally to the limits fixed by the regulations. But the effect of Section 13 (1) is also to fix limits to the warranty provided by this Act.

It will be immediately perceived that such warranty does not ensure that the home covered by the protection of this Act shall be constructed in specific accordance with the precise details of every or any particular construction and sale contract. To the contrary, the warranty is merely that the home be constructed in accordance with the Ontario Building Code, which sets a standard which may be considerably higher or considerably lower than that of a particular builder's contract with his purchaser. But the code does not require ornamental shutters. Nor does it call for bookshelves, trees or other decorative plantings, doors to cover shelves, exhaust fans for bathrooms (which have, as in this case, windows to open) or even vents to go over stoves. It is possible that the code ought to provide these desirable amenities, and that the building codes of certain other jurisdictions do so. We do not know. The standard for Ontario, however, is set by the Ontario Building Code and the claimant herein or anyone similarly confused as to the extent of the warranty provided by this statute will be interested to know that it is a limited warranty, a warranty limited to the promises contained in

Section 13 (1) of the Act, which are that the home should be fit for habitation, free from defects in material, free from "major structural defects" as defined by the regulations, and constructed in accordance with the Ontario Building Code; as well as that it shall be constructed in "a workmanlike manner" - which is a question of fact to be settled in each case at the Tribunal's discretion upon the evidence. Additionally there shall be "such other warranties as are prescribed by the regulations" (if any). The "exclusions" and "limits" to the warranty or warranties given by this Act are set out respectively in Subsection (2) of Section 3 and in Section 3 of By-Law 4 in the regulations, although not necessarily exhaustively. As with the protection provided by so many other warranty programs or insurance schemes and contracts, that given by the Ontario New Home Warranty Plan is not total or absolute. It is great but not total.

The Tribunal welcomes the opportunity presented by this case of clarifying the issues raised.

The Tribunal orders and directs that the claimant's claim herein be dismissed and disallowed in its entirety.

YORK CONDOMINIUM #340

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT, 1976
REFUSING A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: DAVID A. POTTS representing the Applicant
BRIAN M. CAMPBELL representing the Respondent

HEARING
DATES: July 13, 14 and 15, 1981

REASONS FOR DECISION AND ORDER

The Appellant's claim is made under Section 14 1(c) of the Ontario New Home Warranties Plan Act 1976. During the course of the hearing, the claims have narrowed to three, namely regarding:

- (a) leaking exterior walls;
- (b) defective plumbing and heating valves; and
- (c) deteriorating underground garage.

In order for the Appellant to succeed, the matters in respect of which claims are made must be such as would come within the meaning of major structural defect as defined in paragraph 1.(m) (Part 1) By-Law R-1 under the Act, namely:

"major structural defect" means for the purposes of clause b of subsection 1 of section 13 of the Act, any defect in workmanship or materials

- (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

IN RESPECT OF ITEM (a), LEAKING EXTERIOR WALLS, the Tribunal finds that there are defects in workmanship or materials in that there was:

- (1) cracking in the mortar joints extensively;
- (11) gaps left in mortar; and
- (111) poor tooling of mortar.

As a result of the defects, rain water entered into the building causing some damage to the interior, and to furnishing of units.

Counsel for the Respondent has argued that the presence of such water comes within the exclusion set out within paragraph 1.(m) namely, "dampness not arising from failure of a load-bearing portion of the building". The Tribunal is of the opinion that the leakages, and entry of water described go far beyond any reasonable meaning of "dampness" and accordingly the conditions that occurred are not excluded. It is therefore not necessary to consider 'ultra vires'.

It has not been disputed that the brick portions of the structures are not load-bearing. The definitive item to be determined is whether the defect is such "that materially and adversely affects the use of such building for the purpose for which it was intended".

The question is not whether the function of the brick wythe is not carried out. There must be a further effect as to the use of the building. The Tribunal finds that though use is adversely affected, it is not materially so.

The Tribunal is of the opinion that although damage to a degree has been caused, it has not been demonstrated that the effect of the entry of water is such as to materially and adversely affect the use of the buildings for the purpose for which they were intended, i.e. occupancy for residency in the ordinary course.

IN RESPECT OF THE DEFECTIVE PLUMBING AND HEATING VALVES, the Tribunal finds that there are defects in workmanship and materials as set out on page 15 of Exhibit 11, and in respect of their installation. In addition, installations were plastered over so as to make it difficult to locate the valve and to require the removal of plaster for service to the valve. It may be said that the total valve operation was ineffective, for the defects are to an extent that it may be taken that all valves from and including partition stops and angle stops are defective. As a result of the defects, in order to service the ordinary maintenance of plumbing and heating within the units there has been required the shutting off of water both for plumbing and heating purposes to many units other than those directly affected over prolonged periods of time.

The effect was to impose conditions upon residents which adversely affected the use of the building and materially so. The conditions brought about by the faulty valves go far beyond inconvenience; disruption of basic residential facilities to the extent described in evidence comes within the requirements of subsection (ii).

Counsel for the Respondent argued that major structural defect must involve the structure of the building and not a component part. The Tribunal does not agree. With respect to the requirement of subsection (ii) the key factor is the effect and not the extent of the cause.

The Tribunal therefore finds that with respect to plumbing and heating valves, there are defects in workmanship and/or materials that materially and adversely affect the use of the buildings in question, for the purpose for which they were intended, i.e. residency.

IN RESPECT OF THE CLAIM FOR THE DETERIORATING UNDERGROUND GARAGE, the parties have entered into Minutes of Settlement, filed as an exhibit and annexed to the Order herein.

The Tribunal directs the Corporation:

- (a) Not to pay the claim with respect to the leaking exterior walls.

(b) To refund to the Corporation the sum expended in replacement of valves and to pay for or perform such remedial work as is necessary that the valves function from partition stops and angle stops outward.

(c) To carry out the Minutes of Settlement attached hereto.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

ALOI BROTHERS LIMITED
AND VINCENT ALOI

APPEAL FROM A PROPOSAL OF REGISTRAR OF REAL ESTATE
AND BUSINESS BROKERS
TO REFUSE TO RENEW THE REGISTRATIONS OF THE
APPLICANTS AS REAL ESTATE BROKERS

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
K. RAVEN, MEMBER

COUNSEL: HOWARD SWARTZ representing the Applicants
PETER J. WILEY representing the Respondent

HEARING
DATE: March 2, 1981

REASONS FOR DECISION AND ORDER

This was a Hearing pursuant to Section 9(2) of the Real Estate and Business Brokers Act brought at the instance of Aloï Brothers Limited and Vincent Aloï who had been the subject of a Proposal dated January 20, 1981, by the Registrar of Real Estate and Business Brokers to refuse to renew their registrations under the Act for the reasons stated in the Notice thereof (filed as Exhibit 3) and was an appeal from such Proposal.

The Applicants (Aloï Brothers Limited and Vincent Aloï) who were referred to in the Notice of Proposal as the "Company", "Aloï" or the "Registrants", and who shall be referred to in the same way herein as the context may require) were respectively a Limited Company and its sole (or principal) shareholder. Both the Company and Aloï had originally been registered as real estate brokers under the Act on April 6, 1960, Aloï having the position of president of the Company, a position he has maintained at all times up until now.

The evidence disclosed that for the first dozen years or so the Registrants' business operations were carried on in manner relatively unexceptionable and were not the subject of any particularly unfavorable attention by the Registrar or his agents. With little exception the acts or omissions complained of by the Registrar took place within the past decade. The Registrar's Notice of Proposal reads (in part) as follows:

C - REASONS FOR PROPOSING
TO REFUSE REGISTRATION

I. The Company

I am proposing to refuse to renew the Company's registration because I am of the opinion that it is disentitled to registration under section 6 of the Act for the following reasons:

- (1) Having regard to its financial position, the Company cannot reasonably be expected to be financially responsible in the conduct of its business.
- (2) The past conduct of the officers or directors of the Company affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.
- (3) The Company is carrying on activities that are or will be if it is registered in contravention of the Act or the Regulations.
- (4) The Company is in breach of a term or condition of its registration under the Act.

II. Vincent Aloï

I am proposing to refuse to renew the registration of Aloï because I am of the opinion that he is disentitled to registration under section 6 of the Act for the following reasons.

- (1) Having regard to his financial position, Aloï cannot reasonably be expected to be financially responsible in the conduct of his business.
- (2) The past conduct of Aloï affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

D - PARTICULARS

It is alleged as follows:

1. That past inspections of the books and records of

the Company disclosed shortages in the Company's real estate trust account as of December 1, 1976; October 27, 1977 and June 3, 1978.

2. That on October 2, 1978 the registrants consent to the Company's registration being subject to certain terms and conditions.
3. That inspections made subsequent to the imposition of the terms and conditions dated October 2, 1978 disclose that both of the Registrants have on various occasions during the period of January 1, 1979 to March 6, 1980
 - (a) Failed to deposit monies that came into their hands in trust for others persons in connection with the business only in accordance with the terms of the trust and have thereby contravened Section 31(1) of the Act and have also thereby failed to comply with paragraphs 1, 2 and 3 of the terms and conditions of registration.
 - (b) Failed to keep monies that came into their hands in trust for other persons in connection with the business separate and apart from monies belonging to themselves and have thereby contravened Section 31(1) of the Act and have also thereby failed to comply with paragraphs 1, 2 and 3 of the terms and conditions of registration.
 - (c) Failed to disburse monies that came into their hands in trust for other persons in connection with the business only in accordance with the terms of the trust and have thereby contravened Section 31(1) of the Act and have also thereby failed to comply with paragraphs 1, 2 and 3 of the terms and conditions of registration.
 - (d) Failed to deposit monies received by them into a trust account within two banking days of receipt thereof and have thereby contravened Section 20(3), O. Reg. 769 R.R.O. 1970 as amended and have also thereby failed to comply with paragraphs 1, 2 and 3 of the terms and conditions of registration.

- (e) Altered or falsified or permitted the alteration or falsification of books or records respecting bank accounts maintained in connection with the operation of the business and have thereby contravened Section 30(2) of the Act and have also thereby failed to act in accordance with law and with integrity and honesty.
 - (f) Failed to keep sufficient monies on deposit in a trust account to meet the Company's trust liabilities and have thereby failed to act in accordance with law and with integrity and honesty.
 - (g) Failed generally to keep full or adequate books and records respecting the operation of the business so as to enable the Registrar to readily identify certain trust account transactions and have thereby failed to act in accordance with law and with integrity and honesty.
 - (h) Failed to keep true or accurate trade record sheets and have thereby contravened Section 30 of the Act and have also thereby failed to act in accordance with law and with integrity and honesty.
 - (i) Submitted false, inaccurate or misleading records to the Registrar and have thereby failed to act in accordance with law and with integrity and honesty and have also thereby failed to comply with paragraph 4 of the terms and conditions of its registration.
- 4. That from January 1, 1979 to the present the Company's general bank account has shown a substantial debit balance.
 - 5. That as of October 14, 1980 the Company's trust liability appeared to exceed the monies on deposit in its trust account.
 - 6. That a cheque dated October 2, 1980 (#3624) in the amount of \$8,000.00 was written on the Company's trust account by Mario Aloï notwithstanding that Mario Aloï is not a registered real estate broker.

7. That as of December 3, 1980 there was an apparent shortage in the Company's trust account.
8. That a cheque dated October 20, 1980 in the amount of \$3,250.00 payable to V. Aloï General Insurance was written on the Company's trust account without apparent authority.
9. That during the years 1972 to 1978 inclusive, the Registrants removed deposit monies from the Company's trust account respecting transactions that failed to close without following the standard or recognized procedure of the trade with respect to such transactions.
10. The writs of execution respecting Aloï were filed with the Sheriff's Office for the Judicial District of York on April 15, 1980 (Action #46240/79); June 20, 1980 (Action #52645/80) and December 8, 1980 (Action #46830/79).

Upon hearing the testimony of the Registrar's witnesses - compliance officers with The Business Practices Division of the Ministry of Consumer and Commercial Relations - and having read the documentary material entered into evidence on behalf of the Registrar, the Tribunal is of the opinion that the allegations set out above as Item "D - PARTICULARS" are entirely, or at least very substantially, factual and correct and the Tribunal finds upon the evidence before it that there exists adequate, and indeed more than adequate grounds, for an Order upholding the Registrar's Proposal.

The Tribunal finds that the Registrar's staff made numerous attendances upon the Registrants and made many thorough, painstaking and time-consuming inspections of the Registrants' books and records, that they prepared careful and detailed studies and reports of the unsatisfactory areas of the Registrants' operations, that they carefully, fully, patiently and graciously informed the Registrants as to what they were doing wrong, that they met with the Registrants and/or their employees or agents, both at their own premises and at the Offices of the Registrar and on diverse occasions issued written memoranda of instruction as well as verbal instructions to them and eventually attached written terms and conditions to the renewal of their registrations. It is hard to imagine how the Registrar and his officials could have worked harder, shown more good will and patience and made any greater effort (all at great expense to the taxpayers of Ontario) to induce these Registrants to remedy defects in their methods of operating their business which were in open and completely shocking

violation of the law of this Province enacted in that regard and in contravention of the minimum proper standards for the industry in which they had been registered to engage.

On the other hand, the Registrant Vince Aloï has not shown a reasonable or properly responsive attitude at all. His excuse has been to blame the whole mass of wrongdoings upon his employees and subordinates, notably his son Frank Aloï to whom the management of the business appears to have been delegated from the autumn of 1976 until the autumn of 1980 when the latter's registration under the Act, both as a broker and salesmen, came to an end (upon consent, for terms of 18 and 36 months, respectively, concurrently).

Frank Aloï, who testified, seemed willing to accept the role of scapegoat so obligingly as to give rise to the odour of collusion. He is a young man of 24 whose impression upon the Tribunal was considerably less than favourable. During his examination-in-chief of this witness, counsel for the Registrants introduced (as Exhibit 34) an Affidavit which had been made by Frank Aloï on March 12, 1980 and which reads in part as follows (sic):

In August or September 1977 my father and I were called to the Registrar's office and the Registrar J.P. Cox placed us on the Terms and Condition and instructed us to submit to his office monthly bank reconciliations for the trust and general accounts for a period of one year. After one year Mr. Cox requested that we do continue supplying such reconciliations for a further term of one year. We complied with the above instructions.

At first these reconciliations were accurate and truthful, however, as the financial situations worsened and we poured loads of our personal funds into the operation of the business to reduce the large overdraft at the bank and to meet the operational overhead. The bookkeeper Bernie Purpur who was employed by Aloï Bros. Ltd. since June 1977 knew the financial situation of the business and advised me that I could remove the monies from the trust account two or three weeks prior to the closing of the transaction. She stated that it was known to her that other brokers were doing exactly the same thing. At the end of 1977 and during all of 1978 as well as 1979 I removed each month the trust monies from the trust account by authorizing the bank to debit the trust account and place such into the general account, thus creating a shortage in the trust account. This was

done several times each month by debit memos and also by the way of cheques. During this time and after all reconciliations were phony and not accurate.

This open admission of systematic deception of the Registrar impresses the Tribunal as shameless. At another place in the same Affidavit, the deponent states "...I was and am under financial and domestic pressures (My father had recently a serious heart attack)." (sic.) Later, on cross-questioning by a Member of the Tribunal, he admitted his father who has suffered sundry maladies including fatty degeneration of the liver, alcoholism and chronic depression has never had a heart attack. It is hard to conceive of any person above the age of eight, at least who had sat through this Hearing, being willing to give this person any credence at all.

The Registrant Vince Aloï further testified that his personal assets, excluding his interest in the Company, were presently some four to five million dollars. This appears to be true. Since his son Frank's de-registration, he said he had gradually resumed operational control of the Company and was selling-off some of his personal investments in order to restore the Company's financial viability. Evidence was submitted which suggested this was true. Indeed, between the time of Frank Aloï's ostensible withdrawal from the management of the Company to the present, having regard to the financial statement set before the Tribunal, the business appears to have somewhat improved. This may be illusory or it may be the result of recent dramatic improvements in the market effecting this industry generally; or it may be the result of some improvement in the Registrant Vince Aloï.

Throughout the whole of his very able and extremely well-conducted conduct of his client's case, which of course partook of the nature of a defence, counsel for the Registrants continuously urged upon the Tribunal that Vince Aloï, President and principal (or sole) shareholder of the Company, had, at all material times, to wit, from the time the Inspectors began to detect the first signs of business improprieties and contraventions of proper business practices and of the provisions of the Act, been a sick man and a man shattered by domestic misfortune. The evidence in this regard, at least on the face of it, seemed plausible to a considerable degree.

Counsel also urged that the Registrants' operations had not resulted in any particular or specific losses to members of the public - at least there had been no really significant volume of complaints. The Tribunal notes, that so far as it has been made aware in these proceedings, the

Registrants have not displayed a method of operation which preys dishonestly upon the public in the sense that individual members thereof have been deliberately cheated. The complaints are not of that nature. They have to do with potential damage to the public and with actual, achieved damage to the standards of an industry which it is the duty of the Registrar, as of this Tribunal and of every honest Registrant under the Real Estate and Business Brokers Act to uphold and which the Registrants have flaunted.

In consequence of these considerations viz., the health record of the Registrant Vincent Aloï and the absence of evidence of fraud upon individual members of the public, the Tribunal sees fit to mitigate the severity of its decision to a certain degree.

The Tribunal accordingly Orders and Directs the Registrar of Real Estate and Business Brokers to implement his Proposal to revoke the Registrants' registrations herein (or refuse to renew them, as the case may be). But the Tribunal further Orders and Directs that the execution of this Order shall be temporarily stayed for so long as the Registrar, in his absolute discretion, shall be satisfied that the following conditions are being fully and completely met in each and every particular:

1. Vincent Aloï will personally and unconditionally guarantee the present and future obligations of Aloï Brothers Limited as long as the Company is in a negative working capital or net worth position. In this connection, a personal net worth statement is to be provided whenever required by the Registrar.
2. Vincent Aloï will undertake to keep the Company in a position to meet its financial obligations in the normal course of business.
3. The administration and financial management of the business, including all aspects of the business such as bookkeeping and accounting, and excepting only the sole area of sales, shall be conducted by a business manager other than Vincent Aloï, or any person who has been previously employed by him. The individual holding such post shall be acceptable and approved by the Registrar and the Registrar shall have complete discretion to withhold or withdraw such approval from any individual in which case the stay of execution of the Tribunal's Order shall automatically lapse. The business manager shall be in place by June 30, 1981, otherwise the said stay of execution shall automatically lapse.

4. The Company is to be audited annually commencing with the year 1980 as long as required by the Registrar and by independent public accountants acceptable to the Registrar.

5. A monthly reconciliation of the Company's Trust Account certified by the Company's Auditors, shall be provided to the Registrar within 30 days of the end of each and every month during the currency of the said stay of execution otherwise the same shall automatically lapse.

The Tribunal further Orders and Directs that such stay of execution shall become permanent at the end of five years from the date of this Order, provided that it shall not have previously terminated within that period at the Registrar's discretion as provided.

The Tribunal finds on the evidence that a false Affidavit was sworn before the Company's employee, John Cimicata, who is a Commissioner for the taking of Affidavits, by Frank Aloï who represented himself to be Vince Aloï in making such Affidavit - a fact which was surely patent to the Commissioner Cimicata. The Tribunal suggests that the Registrar communicate with the Inspector of Legal Offices or with the appropriate official of the Ministry of the Attorney General in order to effect the cancellation of Mr. Cimicata's Commission as he is not, in the Tribunal's opinion, a fit person to hold it.

ANDREW RICHARD MACMILLAN AND ASSOCIATES REAL ESTATE INC.
and ANDREW RICHARD MACMILLAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATIONS OF THE APPLICANTS

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY SINGER, MEMBER
HARRY C. McARTHUR, MEMBER

COUNSEL: A.N. MAJAINA representing the Respondent
NO ONE APPEARING for the Applicants

HEARING

DATES: August 5, 1981

REASONS FOR DECISION AND ORDER

The Tribunal finds that there is indebtedness by the Applicants (Registrants), in the sum of \$46,968.78 as set out in Exhibit 8.

The Tribunal also finds that Andrew Richard MacMillan has currently filed for bankruptcy.

The Tribunal finds that in 1979 - 1980, the Registrants failed to notify the Registrar of a change in address contrary to section 32 of the Act.

The Tribunal finds that certain forms (Exhibit 10) contain false statements relating to unpaid judgments.

The Tribunal finds that the Reasons set out in paragraph 3, subparagraphs 1, 2 and 3, set out in the Registrar's Proposal would disentitle the Registrants to registration.

Accordingly, the Tribunal directs the Registrar to carry out his proposal.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

RONALD BAILEY

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO REGISTER THE APPLICANT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY SINGER, MEMBER
JAN JUSTIN, MEMBER

COUNSEL: ROBERT BURGIS representing the Applicant
PETER J. WILEY representing the Respondent

HEARING
DATE: September 9, 1981

REASONS FOR DECISION AND ORDER

The application of Ronald Bailey to be registered as a real estate salesman has been considered by the Registrar who has issued a Notice of Proposal dated June 29th, 1981 to refuse the registration. The reasons stated are two fold:

(a) having regard to his financial position, the Applicant cannot reasonably be expected to be financial responsible in the conduct of his business, and

(b) past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The evidence of past conduct placed before the Tribunal upon which the Registrar concludes with respect to (b) is his employment by a corporate entity and/or certain individual(s) that carried on the business of mortgage broker when not registered to do so. The Tribunal is of the opinion that the Applicant was not aware that the entity and/or the individual(s) in the employment of which he was did not have registration under the Act. Further, there is nothing in the evidence before the Tribunal upon which the Tribunal could come to the opinion that he ought to have known or that he was reckless with respect to establishing a relationship with the entity and/or individual(s). Whatever a prudent man or an exceedingly prudent man, or a man who exercises prudence beyond

normality would or ought to do, failure to inquire with respect to a registration where there is no reason of any kind to make such an inquiry cannot be held to be past conduct upon which there can be based a reasonable ground for belief that he will not carry on business in accordance with law and with integrity and honesty.

There is nothing before the Tribunal with respect to the financial responsibility (or lack thereof) of James Tait, that could be a reason why the Applicant ought to have known that he was coming into association with that type of person. Indeed the Applicant himself is an example of how individuals can become indebted without the knowledge of persons within the community who are close to him. For example, Donald Herriman (who testified on Bailey's behalf) who has known the Applicant for some six or more years was unaware of the financial straits of the Applicant until he was advised personally by him. That lack of knowledge and continued association with a person who in fact was financially irresponsible, in the circumstance of this case, is not conduct which can be reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

With respect to reason Number (a) (financial responsibility) the Tribunal finds that the Applicant is indebted generally as set out in Exhibit 9, subject to the reduction of indebtedness to the Toronto Dominion Bank, subject to the additional personal indebtedness to the bank not stated (of some \$11,000) and subject to the the indebtedness which emerged during the course of the hearing with respect to one Lynch (of some \$6,000).

There is nothing in the items of indebtedness that would indicate that any of it came about in the course of business dealings for which he would have the responsibility. The Tribunal, however, does view the financial position of the Applicant as being a serious one and notes that the efforts of the Applicant in respect of repayment fall short of what might be expected of a man who holds the position and the respect within the community that he has.. However, the tribunal notes that Patrick G. Clancy (a friend) is willing to accept a certain arrangement and that Piper Rentals have put forward a reasonable proposal for repayment.

The Tribunal has come to conclusions in the light of his past business activity in which he had a financial responsibility with respect to funds, and in that there was no

evidence placed before the Tribunal that there was any shortcoming in this regard. Employers have expressed themselves in a very positive way with respect to the Applicant. The Tribunal is of the opinion that the indebtedness as set out before the Tribunal is not that upon which to base an opinion that he would be financially irresponsible in his conduct as a real estate salesman, which will be (as one might loosely describe) his business.

The Tribunal has had in this instance very substantial opinion from a group of citizens within the community who have known the Applicant for a long time. It is difficult for the Tribunal, however, to come to a definitive opinion as to the position which would be taken by the public who will have occasion to come into contact with the Applicant.

In the light of the total circumstances, the Tribunal is of the opinion that the registration should be granted subject to terms and conditions, namely:

1. That the Applicant will continue in the employ of Century 21 Gray-Munro Realty Ltd. for a period of one year unless demonstrated to the Registrar that there are reasonable grounds for leaving that employment to go to another broker.
2. That any application for transfer at any time to another broker will be subject to the approval of the Registrar which approval will not be unreasonably withheld.
3. That the Applicant will have no business dealings with Alvin G. McInroy, Paul McInroy, 395645 Ontario Limited, James E. Tait or with any other business with which they are directly or indirectly related.
4. That any mortgage financing with respect to any real estate transaction in which the Applicant will play a role will be done only through the aegis of Donald Herriman with no right of brokerage fees.
5. That the Applicant will comply with the arrangements agreed to by Patrick G. Clancy, and requested by Piper Rentals Ltd. and offer to do the same with any other debtor.
6. That the Applicant will immediately notify the Registrar of any further writs, and of his proposal to enter into any indebtedness over the sum of \$500.00 in aggregate.

7. That the terms and conditions shall apply until all judgments have been satisfied or until all debtors have notified the Registrar of a consent to the removal of the terms and conditions.

8. That these terms and conditions shall continue to apply irrespective of by which broker the Applicant is employed.

9. That the Applicant will notify the Registrar of any finding of guilt, and the Registrar can proceed to review the matter and take such action as he is empowered in the ordinary course under the Act to take.

10. That the Registrar shall have the right to review (and it may be that the Registrar has this right in any event), the registration of the Applicant upon any facts coming to his attention which in his opinion are other than what the Tribunal has expressed itself as finding in the course of this decision, or upon any new facts coming to his attention upon which he is of the opinion that a Notice of Proposal to terminate, or not renew the registration should be based.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

JOHN GRIEVES DEWAR

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
GLEN CHAMBERS, MEMBER

COUNSEL: H. W. ROBERTSON representing Applicant
PETER J. WILEY representing Respondent

HEARING

DATE: June 11, 1981

REASONS FOR DECISION AND ORDER

The Applicant, John Grieves Dewar, has gone bankrupt twice in the last eight years with the result that very substantial sums have been lost by his creditors, several of whom, as it appears (at least superficially) from the materials entered in evidence, were private individuals. The Tribunal takes a very serious and disapproving view of this and of the possibility of it occurring again.

This man has been engaged in the real estate industry as a salesman more or less continuously since 1964. We feel that he ought not to be deprived of his means of earning his livelihood in this industry - provided that the public interest is not in jeopardy and that discredit is not brought upon the real estate industry.

The Tribunal is prepared to grant reinstatement of his registration as a real estate salesman subject to the following conditions:

1. That his employing broker (whoever that may be from time to time) shall undertake to report immediately, in writing, to the Registrar of Real Estate Brokers any client complaint or evidence of personal financial difficulties.
2. That the Applicant will upon request by the Registrar at any time provide a personal financial statement in a form satisfactory to the Registrar.

3. After July 1st, 1982, continued registration shall be contingent upon the Applicant restricting his business activity to the real estate business exclusively and he shall cease absolutely any supplementary occupation whether it be that of an automobile driving instructor or otherwise.

4. Registration shall be deferred to August 1st, 1981.

The Tribunal accordingly Orders and Directs the Registrar to register the Applicant as a real estate salesmen subject to the foregoing conditions.

The decision and reasons therefore were orally given at the conclusion of the hearing in the presence of the two members who concurred.

Mr. RUSSELL PAUL REALTY LTD.
AND RUSSELL PAUL

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO RENEW THE REGISTRATIONS OF
THE APPLICANTS

TRIBUNAL: JOHN YAREMKO, Q.C. CHAIRMAN
H. SINGER, MEMBER
W. J. BINGLEY, MEMBER

COUNSEL: RUSSELL PAUL, acting as agent for Mr. Russell Paul
Realty Ltd. and on his own behalf,

PETER J. WILEY, representing the Respondent

HEARING

DATE: August 11, 1981

DECISION AND ORDER

Upon hearing counsel for the Respondent, the agent for the Applicant Mr. Russell Paul Realty Ltd., and on his own behalf,

Upon reading the consent filed as Exhibit 8,

Upon agreement of the parties to the disposition of the proceedings on consent.

BY VIRTUE OF THE AUTHORITY vested in it under the Real Estate and Business Brokers Act and the Statutory Powers Procedure Act

The Tribunal Orders and Directs the Registrar not to renew the registration of Mr. Russell Paul Realty Ltd. and to renew the registration of Russell Paul as salesman on the terms and conditions set forth in the said consent.

ASHOK TRAVEL LIMITED

APPEAL FROM PROPOSAL OF REGISTRAR UNDER TRAVEL
INDUSTRY ACT

TO REVOKE APPLICANT'S REGISTRATIONS AS A TRAVEL
AGENT AND TRAVEL WHOLESALER

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MARY JANE BINKS RICE, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: DONALD R. BEARDALL representing the Applicant
PETER J. WILEY representing the Respondent

HEARING
DATE: June 29, 1981

RULING RE REQUEST FOR AN ADJOURNMENT

On behalf of the Applicant for the hearing by the Tribunal there has been made a request for an adjournment based on two broad grounds. Part of one is that an application has been made to the Divisional Court that this matter not proceed before the Tribunal on the grounds set out in the application. The matters raised are in the opinion of the Tribunal matters upon which the Tribunal in the course of establishing its procedures is empowered to deal with.

The matter of the Notice of Proposal being signed by Mr. Buckley acting as Registrar has been dealt with by counsel for the Trustees in that action was taken under Section 91 of the Ministry Act.

The other part is:

"That no written reasons have been given as required by Section 6(1) of the said Act, capable in law of supporting the conclusion that the past conduct of the officers or directors of the Registrant affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and with honesty and that the delivery of such written reasons is a condition precedent to the jurisdiction of the Tribunal to hold a hearing pursuant to Section 6 (4) of the said Act.'

Written reasons have, in fact been delivered and it is the very purpose of the Tribunal to determine whether the reasons as stated within the Notice of Proposal are such upon which action under Section 6 can be taken. Reasons were stated by the Registrar and then it is up to the Tribunal to determine whether those reasons are sufficient for the action contemplated to be taken.

The other broad aspect of the request for an adjournment is that the Applicant for the hearing, the registrant, be enabled to engage the services of a chartered accountant to produce evidence to the Registrar that his action, based on financial responsibility, is not justified. The Tribunal is of the opinion that the Applicant has had sufficient time to either have dealt with this matter definitively, or have initiated action to a degree that would warrant an adjournment in order that action already initiated would be completed. The matter in some way has been at the attention of the Applicant since November 1979 and the Notice of Proposal is dated March 16th; so that there would have been sufficient time for the Applicant to have initiated steps in this regard which might easily have, by this time, been completed.

The Tribunal appreciates the position of counsel for the applicant in this matter in putting forth the case on behalf of this client with respect to the charges referred to. This is consumer legislation and expedition is a key ingredient in the administration of the Act. The request for an adjournment is denied.

The above ruling was given by the Chairman in the presence of the other two members who concurred.

ASHOK TRAVEL LIMITED

APPEAL FROM PROPOSAL OF REGISTRAR UNDER TRAVEL
INDUSTRY ACT
TO REVOKE APPLICANT'S REGISTRATIONS AS A TRAVEL
AGENT AND TRAVEL WHOLESALER

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MARY JANE BINKS RICE, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: DONALD R. BEARDALL representing the Applicant
PETER J. WILEY representing the Respondent

HEARING: June 29, 1981
DATES: July 10, 1981

REASONS FOR DECISION AND ORDER

Ashok Travels Limited (herein referred to as the Registrant) is, as of August 1979, a registered travel agent and travel wholesaler. Ashok Shah (herein referred to as Shah) and Nina Shah his wife are the directors and shareholders of the corporation. Prior to the incorporation, the business had been carried on by Ashok and registered as a sole proprietorship as of May 19, 1976.

On the 16th of March, 1981, J. Buckley, acting as Registrar of the Travel Industry Act pursuant to an authorization by the Deputy Minister (see Exhibit 9) issued a notice of a proposal to revoke the registration of the Registrant for the following reasons:

- "1. Having regard to its financial position the Registrant cannot reasonably be expected to be financially responsible in the conduct of its business.
2. The past conduct of an officer and director of the Registrant, namely Ashok Shah, affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty."

As basis for the reasons, it was alleged as follows:

- "1. Inspections of the books and records of the Registrant have been conducted by the Ministry on various occasions since the month of November, 1979. These

inspections have disclosed that during the period in question the Registrant had, and continues to have, a working capital deficiency.

2. The books and records of the Registrant disclose that the registrant has advanced moneys to Ashok Shah and these advances remain outstanding at this time.
3. On or about December 29th and 30th, 1980 Ashok Shah advised the Ministry that the advances referred to in the preceding paragraph had been repaid to the Registrant when in fact they had not.
4. The Registrant has submitted to the Ministry financial statements respecting the business as at July 31, 1980. These financial statements appear to differ materially from earlier financial statements which have been submitted by the Registrant.
5. Ashok Shah also has charges of theft, forgery and fraud pending against him."

In accordance with the practice of the Registrar to make a financial inspection of the operation of a Registrant within three months of a new registration, inspections were made in November and December, 1979 and January 1980 of the books of the Registrant. The purpose of the inspection was basically:

- a) to determine compliance with the rules and regulations pertaining to record keeping and
- b) to gain information upon which there could be an assessment of the financial responsibility of the Registrant.

These and further inspections led to a conclusion that then and at various time subsequently, there was a working capital deficiency as set out in various financial statements filed as exhibits.

There has been filed as Exhibit 10 an information against Ashok Shah setting out the following charges:

- "(1) That Ashok Mansukhlal SHAH on or about the 10th day of June in the year 1980, at the Municipality of Metropolitan Toronto in the Judicial District of York,

unlawfully did steal International Air Transport Association Bank Settlement Plan airline tickets, the property of Air India, of a value exceeding two hundred dollars

CONTRARY TO THE CRIMINAL CODE OF CANADA

- (2) AND FURTHER THAT THE SAID Ashok Mansukhlal SHAH on or about the 10th day of June in the year 1980, at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did make a false document to wit: an International Air Transport Association Bank Settlement Plan airline ticket dated 1 June, 1980, payable to Mr. P. Singh, and validated using the travel agency imprinting plate of Darmis Travel, with intent that it be acted upon as genuine and did thereby commit forgery
- CONTRARY TO THE CRIMINAL CODE OF CANADA

- (3) AND FURTHER THAT THE SAID Ashok Mansukhlal SHAH during the the year 1980, at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did by deceit, falsehood or other fraudulent means defraud Air India of a sum of monies, to wit: twenty thousand two hundred and sixty-six dollars,
- CONTRARY TO THE CRIMINAL CODE OF CANADA".

The Tribunal is of the opinion that sufficient evidence has been placed before the Tribunal to question the financial responsibility of the Registrant in the light of the continuing working capital deficiency though a period of time, and which continues, by reason of advances to or borrowings by the principal of the Registrant which was not rectified until after the Notice of Proposal was issued. The action taken on behalf of the Registrant after the Proposal was action that could have been taken by the Registrant at least within the last six months of 1980. The Tribunal is of the opinion that the financial position of the Registrant is not such as would warrant revocation, and so deprivation of a family of a livelihood. The legislation is set up for consumer protection; yet its structure which sets out entitlement to registration indicates that consideration must also be given to Registrants.

The Tribunal is of the opinion that the imposition of terms and conditions are the proper action of the Registrar. Accordingly, the Tribunal directs the Registrar not to carry out the Proposal to revoke the registration but to continue the registration subject to the terms and conditions as set out by counsel for the Registrar, as modified.

The terms and conditions are to continue until the 31st day of December, 1982 unless terminated earlier by the Registrar.

Because of the nature of the decision, the Tribunal is of the opinion that it is not necessary to make a ruling with respect to the other basis for the Proposal.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

DER TRAVEL

APPEAL FROM DECISION OF
BOARD OF TRUSTEES UNDER TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
GORDON ALEXANDER, MEMBER

COUNSEL: CHRISTINE HOLLOWAY representing the Applicant
MICHAEL D. LIPTON, Q.C. representing the Respondent

DATE OF
HEARING: June 17, 1981

REASONS FOR DECISION AND ORDER

The subject claims were rejected by the Board of Trustees who stated the following grounds for so doing:

- (a) At no time was the clients' monies received by the travel agent.
- (b) The claim is a trade debt and accordingly, it is not covered by the legislation.
- (c) No reasonable and diligent attempts were made by the Travel Wholesaler to collect the money owing to it by Griggs (one of the travel agent debtors).

The Tribunal's decision is based primarily upon Item (b), above.

Upon the evidence before it, the Tribunal finds that the present claims arise from what are in essence trade debts. The claimant advanced credit. This was a decision made by the claimant in the course of its business. In so doing it was accepting a business risk which, in the Tribunal's finding, it was not intended that the compensation fund should insure. The claimant's losses are in the nature of a bad debts incurred in the course of its business. The compensation fund established under the Travel Industry Act should not and cannot operate as a kind of business insurance to protect firms doing business in the travel industry against ordinary business losses arising from the extension of credit. If a firm wishes, in order to expedite its business or for any other reason, to extend credit

it does so without any protection from the coverage which is given by the provisions relating to the compensation fund established under the Travel Industry Act which is a fund designed for the protection of the consuming public.

There are certain instances contemplated by the Act and its Regulations, where travel agents or travel wholesalers who have exposed themselves to a loss in order to protect consumers may properly seek compensation. But the instant case is not such a one. On this ground alone, the claim accordingly must be dismissed.

Counsel for the Respondent has argued that the points (a) and (c) referred to in the initial paragraph, above, were also unsatisfied. He argued there was no proof that the tickets were used or made available to the consumers. It appears that this is so, and constitutes a further defect in the claim.

It is important for businesses operating in the travel industry to understand the limitations of the protection given by the compensation fund. The Tribunal trusts that it will serve as a guideline to the industry at large to know that the insurance or protection afforded under the Act does not operate as general business insurance for the benefit of business operations or operators as such. Credit, if it is to be extended at all by travel wholesalers to travel agents, and in the Tribunal's opinion it ought generally not to be, must be given at the risk of the travel wholesaler and not at the risk of the compensation fund. The fund can operate to protect a travel wholesaling firm in a case where it has sustained a loss as the result of some act undertaken deliberately to protect a consumer or consumers who would otherwise have sustained a loss. It is within the protection of the public that the Fund and the Board of Trustees established for the purposes of its administration must be primarily concerned.

The decision and reasons therefor were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who unanimously concurred.

M. & M. TRAVEL

APPEAL FROM THE DECISION OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT DETERMINING THE CLAIM
OF THE CLAIMANT.

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
VICTOR MASI, MEMBER

COUNSEL: SHEILA McKINNEY, agent for the Applicant
MICHAEL D. LIPTON, Q.C., representing the Respondent

HEARING NOVEMBER 19, 1981
DATE:

REASON FOR DECISION AND ORDER

This is a case where M. & M. Travel, Travel Agents, booked a honeymoon trip for a Mr. Batchelor and his bride. The trip was to start immediately after their wedding. The client paid for it with funds which were given the agent, the present claimant, and then passed along, less the agent's commission, to the travel wholesaler Strand Holidays. Some \$1,537.00 was turned over by the agent to the wholesaler in this way.

Subsequently, the wholesaler announced that the trip it was offering would not take place on the date originally agreed to but on some other date. Batchelor and his bride-to-be could not accept this. They required that the trip which was to be a honeymoon should begin not before the wedding, not the day after the wedding but right immediately after the wedding. The agent, M. & M. Travel operated by Mrs. McKinney agreed. So she cancelled the trip and booked another one from another travel wholesaler, one which would take place on the right date.

Moreover, M. & M. Travel paid for the substituted trip, which was booked in substitution for the Strand trip which was cancelled, and only billed Batchelor for the amount of the excess by which the substituted trip exceeded the cost of the cancelled one.

Up to this point everything was fine with all the parties behaving very well and everybody very happy. In particular Mrs. McKinney and her firm behaved with commendable fairness and graciousness.

It was what happened next that gave rise to the problem which has been set before us.

Having paid for the substituted honeymoon trip at no extra charge to the client, (save as to the excess cost as stated), Mrs. McKinney's firm now found itself entitled to a refund from Strand for the amount advanced to pay for the trip which had been cancelled, an amount in excess of \$1,500.00. The evidence is that a number of telephone calls were made by Mrs. McKinney's office assistants to certain individuals employed at the Strand office but that over a period of about five months from November, 1980 when the Strand trip was cancelled until 4:00 P.M. on April 10, 1981 when Strand ceased to operate as a registered travel wholesaler, no further effort at all was made to collect this substantial amount.

Indeed, M. & M., during the period, actually paid amounts at least double to the amount owing to Strand. These were to cover other and additional trips booked by M. & M. Travel through Strand as part of an ongoing business relationship. As recently as February 17th, 1981 M. & M. paid Strand a sum of some \$2,284.00 without deducting the amount owed by Strand to it, either as a setoff or a contra account

When Strand went out of business in circumstances which indicated that the sum owing M. & M. could not be collected, M. & M. requested that the amount owing be paid as a claim against the Compensation Fund under the Travel Industry Act. This claim was refused on the grounds that it was a business loss and that M. & M. had been insufficiently diligent in attempting to recover it from the firm primarily responsible for its payment.

At this hearing the Tribunal's decision in the Der Travel case which was decided on June 7th of this year, as well as the decision in the case of Carousel Travel Incorporated reported at 1980 C.R.A.T. reports Volume 9, p. 131, were cited. In the Tribunal's view the principles established in those cases are binding upon us, especially the rules we laid down in the case of Der Travel. This fund is not business insurance. It exists to protect the public, not business concerns which may choose to extend credit at their own risk beyond the limits of reasonable prudence.

Accordingly this claim fails and the Trustees' decision to withhold payment of same is by this order upheld.

The above decision and reasons therefore were orally given at the conclusion of the hearing by the Chairman in the presence of the other two members who concurred.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TRAVEL INDUSTRY ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 509

IN THE MATTER OF the decision of the Board of Trustees made
pursuant to Section 15a of the Schedule under the
Travel Industry Act

AND IN THE MATTER OF a requirement for a hearing respecting
the said decision by

P.A. Greer Schiemann

Claimant

and

BOARD OF TRUSTEES APPOINTED UNDER SECTION 5 OF THE SCHEDULE

Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Helen J. Morningstar, Member
J. Gordon Alexander, Member

Upon the matter coming before the Commercial Registration
Appeal Tribunal commencing October 26, 1981, in the presence
of:

Michael D. Lipton, Q.C., counsel for the
Respondent

P.A. Greer Schiemann, not appearing

DECISION

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the
Statutory Powers Procedure Act and under Section 15a(3) of the
Schedule to Regulation 367/75 under The Travel Industry Act,
the Tribunal determines as follows:

1. The claimant was given notice of the Appointment for
Hearing for October 26th, 1981 as evidenced by Exhibit 2 which
contains the further notice:

"...if you do not attend at this hearing The Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

2. The claimant did not appear on any of the days October 26, 27 and 29, 1981, during which time the hearing could be proceeded with.

3. The claimant did not file with the Registrar, though requested to do so, a chart detailing the claim.

There not being sufficient evidence placed for it therefor, the Tribunal does not allow the claim.

STRAND HOLIDAYS LIMITED
O/A STRAND HOLIDAYS AND STRAND CRUISES

APPEAL FROM THE DECISIONS OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT DETERMINING THE CLAIMS
OF THE FOLLOWING CLAIMANTS:

JOHN P. BATTISTA
IDA BEAVAN
JOHN CHISLING
DORIS G. CURRY
A. DALEY
DIANE FLOOK
SUZANNE FRENCH
RUVEN GOTZ
J.B. HILL
L. KARBUSICKY AND C. KARBUSICKY (NEE COLBY)
CRAIG KILLINGBECK
CALVIN LATHAM
KENNETH G. LINN
H. CAROL McERLAIN
NORMA MENEGUZZI
JACK MULCHINOCK
DEBBIE MULLINS
JOAN S. RAINEY
HELEN M. RICE
WILLIAM D. STRYPE
JOHN D. TARGETT
WESTERVELT COLLEGE (WESTERVELT TRAVEL INSTITUTE LTD
ELMER AND ROSE WILKINS
MIKE AND DONNA WILLIAMS

TO BE NOT ELIGIBLE FOR PAYMENT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
J. GORDON ALEXANDER, MEMBER

COUNSEL: J.W. STRYPE, representing Helen M. Rice and
William D. Strype

P. COZZI, representing Elmer and Rose Wilkins

J.A. DENTON, agent for Westervelt College
(Westervelt Travel Institute Ltd.)

MISS N. HANDISYDE, agent for Kenneth G. Linn

ALL OTHER CLAIMANTS appearing in person

MICHAEL D. LIPTON, Q.C., representing the
Respondent

HEARING October 26, 1981
DATES: October 27, 1981
 October 29, 1981

REASONS FOR DECISION AND ORDER

Strand Holidays Limited o/a Strand Holidays and Strand Cruises (hereinafter referred to as Strand) was registered under the Travel Industry Act as a "travel wholesaler" commencing September 30, 1975 (name changed from Strand Holidays (Canada) Ltd. on December 27, 1979) until the 11th of April 1981 when pursuant to section 6 (7), the Registrar cancelled the registration upon the request in writing of the registrant for voluntary termination (Exhibit 13).

The said Corporation was a participant in the compensation fund from September 30, 1975 up to April 11, 1981.

Strand was a "big" "prestigious" organization enjoying a good reputation, well known through the 'package tours' it arranged and operated, and through extensive advertising in volume and geographically. The Tribunal notes as an example the widely distributed magazine type brochure - "Winter Sunshine" (see Mullins filing). The brochure made no reference to Strand being a travel wholesaler but there is shown "Ontario registration #1697984."

None of the claimants knew that Strand was a travel wholesaler; indeed none had any awareness that there were two types of registration nor that there was attributed to the registrations different functions nor that the view was held that different consequences would result in dealings with one type as compared with the other.

The claimants are varied, generally with a common characteristic of a connection with Strand i.e. an employee, a friend of an employee, a relative of an employee, a friend of a relative of an employee, a friend of a friend of an employee, a business contact, and the like. However, there were a number who had no connection with Strand but were simply 'off the street'.

The contact with Strand by the claimants with respect to a transaction thus also varied - direct contact - through a companion - through a relative or friend of an employee. The contact involved : - blank cheque - the pickup and delivery of cheques and cash - directly and indirectly; the contact was sometimes made by one person on behalf of another; indeed in one instance (Westervelt) the contact was made on behalf of a large number who had the relationship of student with the claimant. The transactions included delivery through the contact person of a packet, including vouchers for services to be delivered to the claimant.

Though in some instances the contact was far in advance of the time for the delivery of the travel service, in the main it was on the very eve of the delivery. This occurred because the claimants were purchasing vacancies not theretofore sold (and unlikely to be sold otherwise) or claimants were those who were for a variety of reasons desirous of or enabled of taking a vacation on short notice. Some were aware of and were motivated by a "bargain"; others by the availability. Generally, the travel services were to commence Saturday, April 11th and Sunday, April 12th.

On Friday, April 10th and Saturday, April 11th through media, and information from the office of Strand, claimants became apprised of the fact that the packages of travel services which they looked forward to receiving were not to be available to them.

In a general memorandum of advice on the letterhead of Strand Holiday dated April 10, 1981, to one of the claimants (Claire Karbusicky nee Colby) the statement was made:

"We understand that you and/or your family are booked to fly to either Orlando or St. Croix on a Strand Holiday tour. We regret to advise you that Strand Holidays have ceased trading. As a result your trip will NOT be operating.

There is a compensation fund in existence under the Travel Industry Act designed to protect your monies. We recommend that you contact your travel agent to make either alternative arrangements or for advice making a claim under the Travel Industry Act."

On April 10 and April 11, 1981, statements emanating from sources claiming to be from the offices of Strand or on behalf of Strand or from the Registrar under the Travel Industry Act, were made to persons who had arrangements for travel services as follows:

"Strand Tours has been withdrawn from the market."

"Strand out of business."

"Yes" (to the query "Do you mean bankrupt.")

"Bank has closed up Strand."

"Strand has closed its doors."

"Strand has gone belly up."

"Strand has gone bust."

"No money to be refunded - Strand insolvent."

In connection with the above statements it was generally bruited (by registrants and professionals amongst others) that the claimants need not be concerned about their monies - that the "Compensation Fund" would look after this. No distinction was drawn (indeed there appeared at that time to be no awareness of a distinction) between persons who had been affected. All were directed to the Compensation Fund via the Registrar under the Travel Industry Act.

Many made alternate arrangements based on assurances from what appeared to be authoritative sources as to compensation.

After April 11, certain claimants variously tried to establish contact with Strand but with no success; "phones were not answered"; "phones were disconnected", "offices were closed ('boarded up')"; "couldn't contact anyone."

The claimants based their claim on a contract for services which they submitted were travel services which they did not receive. The failure to receive was not disputed. Certain claimants already on a trip which was paid for had to make alternate arrangements to complete the whole trip as planned.

After the issuing to and receipt from and examination of the claims submitted by the claimants herein, the Board of Trustees under the Travel Industry Act, 1974 issued a Notice of Decision stating:

"..whereas under Section 1(e) of The Travel Industry Act, 1974, states:

"'travel agent' means a person who carries on the business of selling to the public travel services provided by another person;"

therefore, a claim from a member of the public for travel services purchased from a travel wholesaler will not be entertained and is not eligible for payment from the Compensation Fund."

The solicitor for the Board paraphrased this issue as follows:

"Can a member of the public have a valid claim under Section 15(1) of The Travel Industry Act 1974 against a registered travel wholesaler;"

The specific question is, "Is the claimant entitled to a refund." The answer must be found under the provisions relating to claims.

With the exception of an oblique reference to the Compensation Fund, in section 13 dealing with liability, the only provision in the Act with respect to the Compensation Fund is under section 26:

"The Lieutenant Governor in Council may make regulations."

.....

- (j) requiring and governing the establishment and maintenance of compensation funds in trust by travel agents and travel wholesalers and the form and terms of the trust;"

The "Terms of Compensation Fund" are set out in a Schedule to Ontario Regulation 367/75.

In section 14(1) of the Schedule it is stated:

"...and all such money and income shall constitute the fund to be dealt with and distributed in accordance with this Schedule."

The Tribunal is of the opinion that the section relevant to the resolution of the issues here is set out in section 15 of the Schedule as follows:

"15-(1) Subject to subsection 2, the fund is established to stand in the place and stead of a

participant for the payment out of the fund of such claims of clients of the participant that the participant has refused, after demand or is unable to pay, and which claims meet the following requirements.

1. A client who has made payment for travel services to a participant in Ontario and who has not received the travel services contracted for, is entitled to claim for a refund of moneys so paid to the extent that such services are not so provided and after he has made a demand for payment from a participant which the participant has refused without legal justification to pay or is unable to pay by reasons of bankruptcy or insolvency....."

The answer to the question set out above must be found under the provisions of the Regulations. The specific matter to be decided by the Tribunal is:

Is the claimant entitled to claim for a refund for money by virtue of the provisions relating to CLAIMS?

The 'preamble' of Section 15(1) sets out the principles but the subparagraphs set out the requirements. Each claim requires an examination whether it meets the requirements set forth. It is noted that the requirements are not set out as specifics but in a generalized form.

'A client'

It is not clear whether there was intended that a relationship exist with a participant as a prerequisite or whether the term is a general one to delineate one party to a transaction.

The Tribunal is of the opinion that the term is not one of art but in this context is the same as the term 'customer', i.e. one who purchases goods from another. There may be an element in certain situations of the engagement of the professional advice or services of another. The Tribunal is further of the opinion that the characteristics of the party are irrelevant and that no direct contact is necessary to a party being a client. The guide to a determination of who is a 'client' is whether the person was a party to a contract for travel services.

The Tribunal is of the opinion that if any special meaning was to be given to the term client, especially one of limitation, it would have been expressly provided for by definition in section 1 of the Schedule.

The Tribunal finds that each of the claimants herein is a client under the meaning of section 15(1)

'who has made payment to a participant'

It is argued on behalf of the Trustees that two claims (Daley, Killingbeck) did not meet this requirement because the cheques drawn on the claimants' account did not result in debits to the accounts until after April 11, i.e. after Strand had ceased to be a participant.

The Tribunal is of the opinion that the section is not to be interpreted within the context of the laws of Bills of Exchange but in the ordinary meaning thereof - that where a cheque is given which is in due course honoured, payment is made when the cheque is first given over to the participant.

The Tribunal is of the opinion that it would be incongruous for a participant to deprive a claimant of rights by a voluntary cancellation which would make the payment 'not made' even though the cheque honoured had been given prior to the cancellation.

The Tribunal finds that each of the claimants made payment within the meaning of section 15(1).

'for travel services'

Travel services are defined in section 1 of the Act:

- (g) "travel service" means transportation, sleeping accommodation or other service for the use of a traveller, tourist or sightseer;"

The Tribunal is of the opinion that "other service" must be interpreted on the basis of being a direct element of travel and not an indirect element.

Accordingly, the Tribunal finds:

travel service includes:

meals arranged for and paid for in advance

-Hotel charges relating to gratuities (service charges)

travel service excludes:

-taxes of all types - port, airport, departure, hotel, etc.

-insurance however described relating to cancellation (protection against losses prior to departure) (sometimes referred to as waiver fee) or other insurance however described providing protection against accidental death, medical services, loss of baggage, trip interruption, etc.

-Expenses incurred which are not in lieu of travel services contracted for e.g. separate limousine costs

-interest on monies paid for travel services

The Tribunal finds that all the services claimed for are travel services within the meaning of the section, with the exception of those which come within the exclusions referred to above.

'to a participant':

Participant is defined in the schedule, Section 1

(f) "participant" means any travel agent or travel wholesaler who is a subscriber to the fund with the approval of the Registrar.

It is undisputed that Strand is a "travel wholesaler who is a subscriber to the fund with the approval of the Registrar". Ergo, the Tribunal finds that Strand is a participant within the context of section 15(1). The meaning of the Statute is plain; any person reading the sections would come to that conclusion - and understanding that an entitlement would not be excluded because the travel wholesaler is not a registered travel agent.

It was argued that participant should be interpreted as being a participant who is a travel agent. The Tribunal does not agree - the term stands alone. If the intent were as argued, it would have been simple enough to have added the words "who is a travel agent" as a qualification just as it is used in section 15(2) and 15(a). The regulation 367/75 is replete with the use of the term 'participant' without

qualification and so used patently includes travel agent and travel wholesaler. (See for example Schedule Sections 16, 21 and 22.)

The legislation is Consumer Protection and the Tribunal is of the opinion that no interpretation should be made which excludes protection. Provisions of exclusions should be clear. Indeed the clarity in this provision is - that there is no qualification - i.e. no exclusion. The mischief legislated against is loss to clients who contract for travel services and do not receive them.

'in Ontario'

The locale is not in dispute in these claims.

'and who has not received the travel services contracted for'

Non receipt of the services is not in dispute in these claims.' is entitled to claim for a refund of moneys so paid to the extent only that such services are not so provided and after he has made a demand for payment from a participant'

The extent of services not provided for is not in dispute in this claim.

The Tribunal finds that the actions of the claimants upon being advised of the situation of Strand, and that travel services would not be provided and their queries, as to what recourse they had, is equivalent to the 'demand' required

'which the participant has refused to pay'

The Tribunal finds that the actions of Strand were refusal to pay. This is exemplified in its advice memo that it had 'ceased trading' and the direction therein to the Compensation fund. Statements made at Strand offices to the effect "nothing they could do" is tantamount to a refusal. Those to whom vouchers were directed refused to honour them. Such action is to be attributed to Strand. In some instances, persons on holidays had arrangements paid for withdrawn.

'without legal justification'

The Tribunal is of the opinion that under the circumstances of the Strand default there is no onus on the claimant to prove lack of legal justification. Failure to pay without anything more can be taken to be failure to pay without legal justification

'or is unable to pay by reason of bankruptcy or insolvency'

The Tribunal is of the opinion that all claimants also meet this alternate requirement. The Tribunal finds that Strand is unable to pay by reason of insolvency. The Tribunal is of the opinion that the term is not to be interpreted in a technical sense. That Strand does not appear in the Records of the Registrar in Bankruptcy (Exhibit 7) is not proof that Strand is not insolvent. There is abundant evidence that Strand is insolvent in a general sense in that it is unable to meet its debts or obligations or discharge its liabilities in the ordinary course of business as they become due: a claimant (Battista) is not paid wages (\$116.00) that can be described as nominal in the total operation, a substantial judgment (\$61,000 - Exhibit 7) is obtained against it - all the expressions used by persons involved in the matter, e.g. "belly up", etc. including the reply "No. They don't have any money." to the query "Do I sue?" When a Strand employee was quoted the reply, the answer was "that's true."

The inference was placed before the Tribunal that there should be a recourse by all claimants to the Small Claims Court prior to a claim from the Compensation Fund as if the fund were of last resort. The Tribunal is of the opinion that this position is ill-founded. If such were the intent there would have been a requirement for an unsatisfied judgment. In any event, the Tribunal is of the opinion that any action related to Strand under the circumstances of the present claims would have been an exercise in futility not imposed by the section. Such actions presupposes the ability to "trace" Strand which the Tribunal finds beyond the reasonable ability of the claimants.

The matter of a claim by Vanda Beauty Counselor (CRAT Vol. 7, page 79) cited by counsel for the Board, can be distinguished on several grounds - the main one being that Excelsior with which the dealings had been made "is not a registered travel wholesaler nor a participant in the Compensation Fund at the time the Applicant paid the \$1,000 claimed." The matter of a claim by Rudolph Travel Services (CRAT Vol. 6, page 44) can be distinguished in that the claimant (a registered travel agent) had had dealings with a participant who was a registered travel agent and not a registered travel wholesaler, and therefore the claim did not come within section 15(2) as a claim from a participant who is a travel wholesaler.

The Tribunal finds that all claimants have met all the requirements set out in section 15(1)1, subject to the specific findings as to exclusion of items by the Tribunal set out above.

The Tribunal accordingly allows the claims or parts thereof as set out in the Order of even date herein and directs the Registrar to pay the amounts allowed.

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CC40
- c56

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Volume 11
(1982)

Commercial Registration Appeal Tribunal



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Summaries of Decisions

Volume 11 (1982)



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS * - VOLUME 11

CITED 11 C.R.A.T.

- * This volume contains summaries of, and in some instances full decisions and reasons given. If reference to the exact decision is desired application should be made to the Registrar.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

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JEREMIAH J. ROSE
(c.o.b. as ALLENDALE COLLECTION SYSTEM)

APPEAL FROM THE DECISION OF THE
REGISTRAR UNDER THE COLLECTION AGENCIES ACT

REFUSING TO RENEW THE REGISTRATION OF THE APPLICANT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
R. MILLER GRANT, MEMBER

COUNSEL: ROGER OATLEY, representing the Applicant
MICHAEL BADER, representing the Respondent

HEARING
DATE: July 7, 1982.

REASONS FOR DECISION AND ORDER

An initial application for registration by Jeremiah Joseph Rose was made on the 23rd day of February 1978 (Exhibit 5, Tab 1) for registration as a mortgage broker under the Mortgage Brokers Act. The name under which the business is shown to be operated is as Allendale Mortgage Services. The registration which was issued on the 5th of April 1978 was that of Jeremiah Joseph Rose as mortgage broker under the style of Allendale Financial Services. There was no explanation for the change in name. The Tribunal notes again that the original application was by Mr. Rose personally for the name Allendale Mortgage Services.

On March 9th, 1979, Allendale Financial Services was incorporated (Exhibit 5, Tab 3) and Allendale Financial Services Limited operating as Allendale Mortgage Services applied for and received a licence under the Mortgage Brokers Act on the 1st day of July 1979.

The application for registration shows Jeremiah J. Rose as the President and a shareholder holding 100 voting shares being all of the voting shares of the Corporation, together with his wife as shareholder holding 100 non voting shares.

Subsequently, Jeremiah J. Rose applied for and was granted registration as a collection agent on the 9th day of May 1980 operating as Allendale Collection System. The participation by Jeremiah J. Rose in Allendale Financial Services Limited was fully disclosed to the Registrar of Collection Agencies when application to the Registrar was made.

With reference to Exhibit 4, Tab 2, paragraphs 7 and 8 give the details of this disclosure. In particular, to question 8:

"Will the Applicant (or any partner in the case of a partnership, or any officer or director, in the case of a corporation) be engaged, occupied or employed in any business, occupation, or profession other than the business for which registration is requested?
If yes, give full particulars:"

is given the answer:

"Allendale Financial Services Limited
c.o.b. Allendale Mortgage Services"

Further in an application shown in Exhibit 4, Tab 12 to similar questions, the answer is given in paragraph 7, "Registered as a mortgage broker" and in 8 "will still remain President of Allendale Mortgage Services."

The application considered by the Registrar in the present instance and which is before the Tribunal is set out in Tab 17 and to similar - (not identical questions) - the following answers are given:

"a) Is the applicant registered, or has the applicant ever been registered, under any other acts. If yes, give full particulars."

The answer given is "Yes" and the detail shown is "mortgage broker".

The Tribunal notes in particular the answer to question 4:

"Is the applicant engaged, occupied or employed directly or indirectly in any other business, occupation or profession. If yes, give full particulars"

and the answer is given "as a mortgage broker".

This application dated the 31st day of March 1981 is an application for renewal of registration as a collection agency. The Registrar under the Collection Agencies Act issued a Notice of Proposal to refuse to renew the registration of the Registrant because of his opinion

"... that the registrant is disentitled to registration under Section 6 of the Act, for the following reason:

The registrant is carrying on activities that are, or will be, in contravention of the Act, or regulations thereunder."

The Tribunal finds that Allendale Financial Services Limited, carrying on business under the firm name and style of Allendale Mortgage Services is carrying on the business of lending money. The Tribunal finds further that Jeremiah J. Rose as President and beneficial owner of 100% of the voting shares is as such engaged indirectly in the business of lending money.

The Tribunal finds that Allendale Financial Services Limited is merely the vehicle through which Jeremiah J. Rose is engaged indirectly in the business of lending money. Indeed, Jeremiah J. Rose recognizes this by his answer in the application (Exhibit 4, Tab 17) for he gives the forthright and simple answer that he is engaged in, occupied or employed directly or indirectly "as a mortgage broker".

Submission has been made that the Tribunal should consider the direction of the registration subject to terms and conditions. The Tribunal does not believe, under the circumstances of the generalities of the details of the future operation placed before it, that it should follow such a course of action. However, the Tribunal notes Section 9 of the Collection Agencies Act:

"A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

The Tribunal finds that the Applicant Jeremiah J. Rose is carrying on activities that are or will be in contravention of Regulation 13(14). Accordingly by virtue of the authority vested in it under the Collection Agencies Act, Section 8, the Tribunal directs the Registrar to carry out his proposal. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal was subsequently discontinued.

BAILIFFS ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 37

IN THE MATTER OF the APPOINTMENTS of
THE AMALGAMATED BAILIFFS LIMITED
GEORGE ELEFThERIADIS
LARRY SMOLLETT

AND IN THE MATTER OF the PROPOSAL of the
Registrar of Collection Agencies under the
Collection Agencies Act
made pursuant to Section 10(1) of the Bailiffs Act
TO REVOKE THE APPOINTMENTS
- Proposal dated: 14th day of July, 1982

AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal pursuant to Section 10(2).
- Requirement dated: 28th day of July, 1982, by

THE AMALGAMATED BAILIFFS LIMITED
GEORGE ELEFThERIADIS
LARRY SMOLLETT

Applicants

and

THE REGISTRAR OF COLLECTION AGENCIES UNDER THE
COLLECTION AGENCIES ACT

Respondent

IN ATTENDANCE BEFORE:

Matthew Sheard, Vice-Chairman as Chairman
W.W. Evans, Member
J.P. Dalton, Member

Upon the matter coming before the Commercial Registration
Appeal Tribunal on the 19th day of October, 1982, in the
presence of:

Frank Hubscher, representing the Applicant

Peter J. Wiley, representing the Respondent

ORDER AND ADJOURNMENT

UPON the application to the Tribunal by the Respondent, the Registrar of Collection Agencies, for an adjournment and issuance of a consent order of the Tribunal pursuant to section 4 of the Statutory Powers Procedure Act and having read the Consent to Order of the parties hereto (which is undated but which has been filed upon this date) as evidenced by the execution thereof by George Eleftheriadis and by Amalgamated Bailiffs Limited over its corporate seal and signature of its authorized signing officer and hearing what was said by counsel for the Applicants and Respondents the said Consent being filed and attached hereto;

NOW THEREFORE this Tribunal doth issue and order upon the terms of the said consent and adjourns this hearing sine die to be brought back on 5 days notice, one party to another or by the Registrar, to a date to be fixed by the Registrar.

WILLIAM DAVID WOODLIFFE
(BELLWOOD ENERGY SYSTEMS)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF THE CONSUMER PROTECTION BUREAU
OF THE CONSUMER PROTECTION ACT

TO REFUSE REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LEONARD C. WEBSTER, MEMBER

COUNSEL: WILLIAM DAVID WOODLIFFE, appearing in person
A.N. MAJAINA, representing the Respondent

HEARING August 19th, 1982
DATE:

REASONS FOR DECISION AND ORDER

The Applicant, William David Woodliffe, carrying on business under the name and style of BELLWOOD ENERGY SYSTEMS, hereinafter referred to as Woodliffe, applied for registration as an itinerant seller pursuant to the Consumer Protection Act by an application dated June 19, 1981. The nature of the applicant's business is the installation of heating and energy saving equipment. In the application Woodliffe disclosed that he was charged with twenty counts of fraud. The Registrar caused inquiries to be made in respect of these charges and discovered that there were twenty-four counts of fraud alleging that the applicant as a director of the Society had defrauded the Sudbury and District Society for the Prevention of Cruelty to Animals. The court information disclosed that two counts were dismissed on a preliminary inquiry and that Woodliffe was ordered to stand trial in respect of the other charges. On August 26, 1981, the Registrar issued a notice of proposal refusing to register the applicant together with alleged particulars pursuant to section 7(1) of the Consumer Protection Act indicating that the past conduct of Woodliffe affords reasonable grounds for belief that he would not carry on business in accordance with law and integrity and honesty within the meaning of section 5 of the Act. It is from this proposal that the applicant applies to the Tribunal to set aside the refusal to register.

At the hearing the Ministry led evidence to establish that Woodliffe had pleaded guilty to four counts of fraud in February of this year and had received a sixty-day intermittent sentence. The Ministry requested that the Tribunal consider the evidence of the eighteen counts of fraud which were withdrawn. The Tribunal refused to consider this evidence in any fashion unless the Ministry called the actual complainants and was leading this evidence as evidence of past misconduct as distinct from past criminal behaviour. The Tribunal was of the opinion that it could not consider hearsay evidence of charges that were withdrawn as the reason for the withdrawal would be a matter of complete speculation and therefore no inference whatsoever should be drawn against the applicant.

In addition to the evidence of four criminal convictions for fraud, the Ministry requested the Tribunal to consider the fact that in December, 1981, Woodliffe was carrying on business as an itinerant seller, which he had been since March, 1981 and that up until the time of inspection, Woodliffe had engaged himself by supplying goods or services in respect of sale and installation of gas furnaces to about 240 consumers by way of executory contracts. By his letter of January 14, 1982 the Registrar required that Woodliffe should cease immediately from entering into any future business in this manner as he was not registered under the Act.

As well as the foregoing evidence the Ministry introduced evidence that William Andrew Woodliffe applied for registration as an itinerant seller on March 9, 1982 on behalf of Bellwood Energy Systems Ltd. The evidence showed that William Andrew Woodliffe, the son of William David Woodliffe was applying to be registered as the sole shareholder of the applicant's business enterprise. The applicant would perform the furnace installation. The Registrar met with the applicant and his son and indicated he would be prepared to permit registration by the son on the condition that the son post a performance bond of \$10,000.00 in addition to the \$5,000.00 guarantee bond required by the Act and that the son obtain the permission of the Registrar before any change in corporate structure.

For reasons which still remain to be satisfactorily explained to the Tribunal, the applicant and his son at first appeared to agree to these conditions, which conditions appear reasonable to the Tribunal and then indicated that they could not comply with them. The Registrar issued a Notice of Proposal to refuse to register Bellwood Energy Systems Ltd. which did not exercise the statutory right to require the Tribunal to hold a hearing with respect thereto.

The applicant testified before the Tribunal on his own behalf. He indicated that he did not think the request for a performance bond from his son was a reasonable request despite his (the father's) four convictions for fraud, the evidence of which clearly demonstrated that he had abused a position of trust over a considerable period of time. The applicant also indicated that he did not consider his contracts executory.

After reviewing all the evidence led by counsel for the Ministry and after considering the testimony of the applicant which the Tribunal found in some respects perplexing, the Tribunal finds that the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and integrity and honesty.

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 7(4) of the Consumer Protection Act,

The Tribunal directs the Registrar to carry out his Proposal to refuse the registration of the Applicant as an itinerant seller pursuant to the Consumer Protection Act.

MORTGAGE BROKERS ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 295

IN THE MATTER OF a Proposal of the Registrar of Mortgage Brokers pursuant to Sections 5 and 6(2) of the Mortgage Brokers Act, dated June 26th, 1981 to refuse to renew the registration of Bayhold Financial Corporation Limited and also of Rescom Investments Limited, each as a mortgage broker

AND IN THE MATTER OF a requirement for a hearing respecting the said proposal

BAYHOLD FINANCIAL CORPORATION LIMITED

-and-

BAYHOLD FINANCIAL CORPORATION LIMITED AND ITS DIRECTORS AND OFFICERS BEING ALAN FELDMAN, CHARLES SOMERVILLE AND BEVERLEE FELDMAN

-and-

RESCOM INVESTMENTS LIMITED

-and-

RESCOM INVESTMENTS LIMITED AND ALAN FELDMAN

Applicants

AND

REGISTRAR OF MORTGAGE BROKERS

Respondent

BEFORE:

Matthew Sheard, Vice-Chairman as Chairman
Watson W. Evans, Member
David S. Baillie, Member

Upon the matter coming before the Commercial Registration
Appeal Tribunal commencing February 16, 1982 in the presence of:

Bernard Chernos, representing the Applicants

A.N. Majaina, representing the Respondent

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under the Mortgage
Brokers Act, Section 7

Upon the consent of the parties hereto the Tribunal Orders that
the Agreement made pursuant to section 4 of the Statutory
Powers Procedure Act this day executed by counsel on behalf of
the said parties be implemented and the same shall go as the
Order of the Tribunal in disposition of this matter.

CONSENT TO ORDER

1. The Bayhold Financial Corp. Limited and Rescom Investments Limited and Fenne Holdings Limited make this agreement without admission of the truth of any allegation contained in the Registrar's Notice of Proposal of June 26, 1981.
2. Bayhold and Rescom hereby withdraw their respective applications for a Tribunal hearing.
3. The Registrar shall grant temporary registration to Bayhold, Rescom and Fenne Holdings Limited solely for the purpose of winding down their current mortgage portfolios and not for any other purposes. During the process of this winding down the net proceeds upon realization of any investment shall be deposited in a properly designated trust account, as provided in section 5 of the Regulations under the Mortgage Brokers Act and be disbursed to the investors in accordance with their respective interests.
4. Upon completion of the winding down of the said mortgage portfolios the registration of Bayhold, Rescom and Fenne shall be terminated without prejudice to their right to apply for registration.
5. Full particulars of the said current mortgage portfolios shall be provided by the Registrants to the Registrar by April 16, 1982 and thereafter bi-monthly reports to bring current the status of the portfolios.
6. The parties to this agreement shall have the right to apply to the Tribunal, upon giving 10 days notice, for any further or other direction as may be required, either by formal attendance or by correspondence.

Dated at Toronto this 17th day of February, 1982.

"Bernard Chernos"
as to the signature
of Gordon McLean

"Gordon McLean"

Bayhold Financial Corp. Limited,
Rescom Investments Limited and
Fenne Holdings Limited, by their
solicitor

"Randy Reese"
as to the signature
of A. Majaina

"A. Majaina"

Registrar, the Mortgage Brokers Act
by his solicitor

CREDITMART FINANCIAL CENTRES LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF MORTGAGE
BROKERS

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
MURRAY SUSSMAN, MEMBER
H. SINGER, MEMBER

COUNSEL: JOSEPH BACHT, appearing on his own behalf
A. MAJAINA, representing the Respondent

HEARING

DATES: January 11, 12, 13
February 19, 20, 1982

REASONS FOR DECISION AND ORDER

The Applicant, Creditmart Financial Centres Ltd. (Creditmart), appealed to this Tribunal from a Proposal of the Registrar of Mortgage Brokers (notice of which was dated April 23, 1981) made pursuant to Sections 5, Subsection 1 and 6 Subsection 2 of the Mortgage Brokers Act R.S.O. 1970 c.78 (now R.S.O. 1980.ch.295) as amended and the Regulations made thereunder, which was a Proposal to refuse to renew the Applicant's registration as a Mortgage Broker, the Applicant having applied for a renewal of its registration on or about June 3, 1980 for the period 1980-1981. At the time of the Hearing - and up to the present time - by virtue of Section 7 Subsection 8b of the Act the Applicant was carrying on business, its registration having been "deemed to continue" pending the Tribunal's decision.

The Registrar's reason(s) for his Proposal are set out at p. 2, paragraph 3 of his Notice of Proposal as follows:

REASON FOR THE REGISTRAR'S PROPOSAL
AS REQUIRED BY SECTION 7 (1) OF THE ACT

(1) Creditmart is a corporation and having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, within the meaning and contemplation of section 5 (1)(c)(i) of the Act; or

(2) Creditmart is a corporation and the past conduct of its officer (President) and director, namely, Josef Bacht (Bacht), afford reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, within the meaning and contemplation of Section 5(1)(c)(ii) of the Act; or

(3) Credit mart is carrying on activities, through Bacht, that are, or will be, if registration of Creditmart is renewed or continued, in contravention of the Act or the regulations, within the meaning and contemplation of Section 5(1)(d) of the Act; or

(4) Creditmart is in breach of a term or condition of registration, within the meaning and contemplation of Section 6(2) of the Act.

These four sub-paragraphs will be referred to herein as Reasons numbers one to four, respectively.

Reasons one, two and three relate to Section 5(1)(c) and (d) which read as follows:

5.(1) An applicant is entitled to registration or renewal of registration by the Register except where,

(c) the applicant is a corporation and,

(ii) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations....

Reason number four relates to Section 6(2), which reads:

6.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if he were an applicant, or where the registrant is in breach of a term or condition of the registration.

At p. 24, paragraph 18, of the Notice of Proposal, as an apparent afterthought, additional or supplemental to the above reasons, particularly Reason number four, the Registrar states that the Registrant is also in breach of Section 5(2) as well as Section 6 (2) in that the requirement of Section 3(3b) of the Regulation made under the Act had not been complied with. Regulation 3(4b) - which is now Regulation 3(6) - reads, (in part) as follows:

3 -

(6) Where the registrant is a corporation a copy of the most recent audited financial statement... shall be filed with the Registrar on or before the 30th day of June in each year.

At the commencement of the Hearing Mr. Bacht, who appeared as agent for the Applicant (in the place and stead of Counsel) and in the course of his own testimony, introduced into evidence Exhibit 4 which is a binder containing 222 pages of typewritten explanatory submissions and documentary evidence. (He supplied, in addition, additional binders being copies of this, for opposing counsel and for each member of the Tribunal.) When entering this exhibit Bacht testified to the Tribunal that its contents insofar as the same purported to be statements made by him were true - i.e. he incorporated the same into his testimony by reference.

It is convenient at this point to quote extensively from pp. 119 and 120 of Ex. 4:

Creditmart applied for renewal of its registration on June 3, 1980 for the period 1980/1981. An un-audited financial statement was prepared and attached to the application for renewal.

Creditmart was incorporated in November 1978, it remained an inactive Corporation until about October 1979, at which time it accepted a special assignment from Funding World Inc., to undertake a study on franchising. The Company did not become more active until June of 1980, when it entered the mortgage brokerage field.

The first audited financial statements of the Company for the period ending April 30, 1980 from date of commencement of business were completed on July 15, 1980, although existing Ontario and Federal regulations require such statements and filings to be completed not later than six months (October 31) following the fiscal year end.

At the time of Creditmart's application for renewal of its mortgage brokers licence, namely June 3, 1980, no audited statements were available and Creditmart submitted an unaudited financial statement with said application as aforementioned.

I have attached hereto a copy of said financial statement.

The Registrar alleges in his proposal dated April 23, 1981 that Creditmart has not yet supplied a copy of the audited financial statement for the period ending April 30, 1980, when, in fact, he was handed and given the audited financial statement for the period ending April 30, 1980, on January 20, 1981. On said date, Mr. Greenwood, one of his employees, visited the offices of Creditmart, asked for and received the aforementioned statement.

A copy of the audited financial statements of Creditmart for the period ending April 30, 1981, was mailed to the Registrar on June 8, 1981.

Copies of both financial statements, period ending April 30, 1980 and April 30, 1981, have been attached hereto.

The Tribunal notes that what purports to be copies of both financial statements, certified as being audited by Dirk Van Dalken, C.G.A., C.A., have been included in the said exhibit being part of Mr. Bacht's evidence as stated. Also included is an Interim Financial Statement - Unaudited - for the period May 1st, 1981 to December 23rd, 1981. The latter discloses net loss of \$562.00 and current liabilities not in excess of \$500.00. The audited statements showed a net loss and deficit of \$14,553.00 at the end of April, 1980, and a deficit of \$10,865.00 at the end of April, 1981 (i.e. the \$14,553.00 deficit having been reduced to \$10,865.00 a year later). The ostensible deficit is the subject of the following purported explanation set forth towards to bottom of page 120 of Exhibit 4:

On page 3, paragraph 5 and on page 7, paragraph 12 and 13 of the Registrar's proposal, he states that Creditmart had a loss of \$14,553.00 for the period ending April 30, 1981. (It may be noted that the Registrar must have a copy of the April 30, 1980 Financial Statements, since he is referring to this audited operating loss, although on page 24, paragraph 18 of the Registrar's proposal, the Registrar disputes ever having received such a statement.) The Registrar alleges that one should not ignore the possibility of insolvency of Creditmart. Relative to the financial statement for the period April 30, 1980, it must

be noted that Creditmart had an internal profit of \$3,447.00 before salaries of \$18,000.00 to the shareholder. Said salaries were not paid out but deferred by the shareholder. Said salaries injection into the financial statements in the amount of \$18,000.00 was recommended by the corporate chartered Accountant/Auditor as part of a long range tax design for the shareholder.

At p. 6 paragraph 11, of the Registrar's Notice of Proposal, (and in further support of Reason number four) it is stated (at the end of the third sub-paragraph) that "further, Creditmart has not kept and maintained a general ledger and this factor made it difficult to perform a proper or full inspection, also being a contravention of s. 6 of the Regulations." In reply to this, Bacht's evidence, at page 3 of Exhibit 4, reads as follows:

"Creditmart has, in fact, kept proper records, general ledger, receipt journal, general journal, disbursements journal, clients' ledger, etc., and has done so on an annual basis."

But in his viva voce testimony Mr. Bacht admitted that, in August 1980 (presumably at the time of the second inspection made on behalf of the Registrar) "some" of the applicant's records were not in proper condition. The Tribunal accepts Mr. Bacht's evidence thus far referred to above, relating to alleged breaches of ss. 5(2) and 6(2) including the final statements, more or less at its face value.

At this point, and in respect of Reason number 4, the Tribunal holds that there have not been established, on behalf of the Registrar, adequate grounds to justify the implementation of his proposal upon the ground set forth therein at p. 3 (4) to wit, that Creditmart is in breach of a term or condition of registration, within the meaning and contemplation of s. 6(2) of the Act; or, as alleged elsewhere, of s. 5 (2) of the Act. However, we shall have more to say in connection with these matters, the keeping of books and records and the provision of financial statements, further on herein.

Consideration must now be given to Reasons one, two and three set forth in the Notice of Proposal which the Tribunal perceives to reflect by far the weightiest area of the Registrar's concern; certainly this is the area of the Tribunal's greatest concern.

The first witness called on behalf of the Registrar was Detective Officer David Colin Parkinson of the Peel Regional Police who gave evidence concerning an investigation undertaken by his department and especially by himself and Detective Jim

Craig. This investigation was described by Detective Parkinson in his testimony and a synopsis of it was entered as Exhibit 5A. It was a lengthy, painstaking and detailed investigation and appears to light-up numerous and grave wrongdoings on the part of a number of persons against whom, the Tribunal was told, serious charges are pending, or, in respect of whom reasonable and probable grounds for the laying of charges are believed to exist. The Tribunal must address itself to this area of the Registrar's case with caution. It has studied the officer's testimony as well as the exhibit (Ex. 5A) introduced through him with the sole purpose of determining whether or not any of this material is relevant, on a prima facie basis, to the Registrar's complaints against the Applicant or its officers or shareholders named in the Notice of Proposal. Because this material relates to other persons and other cases actually or potentially pending in other forums, notably the criminal courts, we shall not particularize it at this time beyond the minimum degree necessary for our present purposes, as stated (which is not, fortunately, extensive). In short, having heard and examined the evidence relating to this area of the Registrar's case, we find that Joseph Bacht during a time previous to the commencement of his active full time association with Creditmart Financial Centres Ltd., the corporation whose registration the Registrar now seeks to extinguish, was involved with two other companies which were, but are no longer, also registered under the Mortgage Brokers Act having come to grief in circumstances which have put the Registrar and his inspection and compliance (as well as the police) to great trouble and given rise to grave concern for the interests of the public.

In fact, as we have learned from multiple sources, Josef Bacht was at one time the president or chief executive officer of each of the two companies referred to (viz., I.M.A. Financial Corporation Limited and Funding World Inc.), being the same position or positions he subsequently held, up until his resignation therefrom, in favour of his solicitor by reason of his personal bankruptcy, in the corporate registrant which has been the subject of this Hearing.

I.M.A. FINANCIAL

The first of these two earlier companies, I.M.A. Financial Corporation Limited, was registered as a Mortgage Broker under the Act from May 6th, 1974 to June 30th, 1978. At the time of the Registrar's proposal, April 23rd, 1981, it had become insolvent. The Tribunal heard a great deal of evidence concerning the details and circumstances of Mr. Bacht's involvement with this company as well as how he came to disassociate himself with it. It seems that a Mr. Hans

Moehring, a registered Real Estate Broker, the president of Century 21 Brenmore Real Estate Limited, and a Mr. William Phinney were associated with Bacht in the operation of I.M.A. Financial. Bacht was president and Moehring and Phinney were vice-presidents. Initially Bacht took 30% of the shares of I.M.A. Financial and the remaining 70% were held by the "Patmore Group Ltd.", which appears to have been a holding company controlled by Moehring and certain European interests such as the "Hansiatc Partners" and "Canadeuro Investment Corporation Limited". The Patmore Group Ltd. also controlled Century 21 Brenmore Real Estate Ltd. (Brenmore). Bacht's evidence was that I.M.A. Financial was modestly successful at the outset of operations. But soon the sister company, Brenmore Realty, ran into terrible difficulties losing \$256,815.00 in the fiscal period ending April 30th, 1976 and a further \$401,498.00 in the fiscal period ending April 30th, 1977. Subsequently, up to and including the month of October, 1977 Brenmore had lost a further \$100,000.00.

Bacht further testified that "all losses were financed through a complexity of borrowings (sic) at which Moehring was at his best. For example, against my advice and under protest of my resignation, he made I.M.A. Financial borrow \$200,000.00 from first City Financial on August 19th, 1976. Said funds were injected into Brenmore from I.M.A. Financial through Patmore".

Bacht provided his personal guarantee for this loan with Moehring's assurance to him, as he further testified, that a Mr. Leavitt, an executive of proven ability and skill hired by Bacht would be appointed President and Chief Executive Officer of Patmore. For it was Bacht's opinion at this time that Brenmore Realty was mismanaged and rapidly drifting towards bankruptcy and that this disaster course would invariably wreck Patmore Group and I.M.A. Financial as well. He paints a picture of a terrible financial tempest, himself gallantly manning the pumps, but with hands other than his own applied to the helm and counsel contrary to his own determining the course to be followed, a course he knew to be wrong, and despite his bravest efforts to alter it:

"It was my opinion throughout 1977 that the mounting losses generated by Brenmore would bankrupt the Patmore Group of companies unless specific changes were made in the business practices of Brenmore. I made my views known many times ..." (but these were ignored), he swore. Memorandum after memorandum was vainly communicated by Bacht, all to no avail; the drift towards financial destruction relentlessly continued and at last "when I finally realized that any further efforts by myself or co-directors would be useless relative to

Moehring's management practices, I resigned from all positions in the Patmore Group and subsidiaries. Attached and marked Exhibit "M" is the letter of my resignation to the Board of Directors of the Patmore Group dated December (30), 1977, and a letter to the Registrar of Mortgage Brokers (of even date) advising him of my resignation from I.M.A...."

Thus Bacht, unable to influence the inevitably disastrous impact of impending events, slipped over the side and abandoned ship, rowing (as he thought - but mistakenly - as it transpired) toward safer and more tranquil waters.

A few months later, on October 11th, 1978, at p. B2, the Globe and Mail carried the following obituary:

"Last month Century 21 Brenmore Real Estate Ltd., one of the largest Century 21 Real Estate Franchises in Toronto, was placed under voluntary assignment in bankruptcy, with 1.4 million dollars owed to 89 creditors and about 2.2 million dollars in uncompleted real estate transactions. Price Waterhouse Ltd., of Toronto, the trustee, was assigned the task of untangling the intricate financial dealings to free the money held in trust... Brenmore was controlled by Patmore Group Ltd., of Toronto, a public company traded over the counter with 2,200,000 shares. Patmore also controlled I.M.A....., a mortgage brokerage business run by Josef Bacht. Initially both Mr. Bacht and Mr. Moehring jointly controlled Patmore. Mr. Bacht left the organization in December, 1977, because of a disagreement with Mr. Moehring over the way he ran the business. 'The purchase of the franchise just sped up the inevitable. Brenmore would have gone under even if it had not purchased it, but certainly it was an extra cost burden' Mr. Bacht said in an interview."

On or about June 30, 1978, I.M.A. Financial effectively ceased further operations and voluntarily disappeared from the register of Ontario Mortgage Brokers.

Some years later, recalling these events in a letter to the registrar of Mortgage Brokers for the Province of Ontario, L.C. Mauer, who had been one of Mr. Bacht's co-directors at the time (and is presently President of Condor Management Services Ltd.) wrote:

"Neither Mr. Bacht or I, in my opinion, nor did any other director of Patmore other than Mr. Moehring, as controlling shareholder, have any influence in the running of the corporation.

"Mr. Bacht finally gave up and submitted his resignation.

"My present opinion as to Mr. Bacht's integrity and management ability is beyond question...." (letter dated May 11, 1981. Ex. 4, p.28)

FUNDING WORLD

On January 7th, 1981, Mr. S. Belzberg wrote to Josef Bacht, "I heard through the grapevine that you had gone out into a new organization on your own, and I certainly wish you the very best."

The new organization which Mr. Belzberg had heard through the grapevine that Mr. Bacht had entered on his own was Funding World Inc. Registration as a Mortgage Broker was granted to Funding World on or about August 23rd, 1976 (about four months before Bacht left I.M.A.) It lapsed on June 30th, 1980. At that time it was or had been insolvent and its total liability according to the registrar was considered to be substantial.

Presumably Bacht hoped to be able to make a new start in the new business, but, as so often happens, the past lingered on in a number of ways - two in particular. His personal liability arising from the guarantee he had given for the First City Loan to I.M.A. of which \$150,000.00 remained outstanding as of the end of January, 1978, was a continuing source of anxiety to him, as well it might have been, and as he revealed in a letter of January 25, 1978, to Mr. Jeffrey of City Savings & Trust Company in Vancouver, reading in part as follows:

There are two areas of concern, namely the First City Loan and my ability to earn a livelihood with Funding World in order to maintain financial stability.

It is my belief that First City must take whatever steps necessary to protect the loan outstanding under the pledge agreement. A status quo acceptance of current affairs will no doubt place the loan in jeopardy and if present court proceedings against myself should be permitted to continue, it's only a matter of time before Funding World will be forced out of business.

We feel sympathy for Mr. Bacht in this concern which he expressed at this time and can appreciate his fears which the guarantee he had given aroused for, as he put it, "my ability to earn a livelihood in my new endeavour".

Is it possible that worry and stress now sapped his powers of judgement? For the other way in which the I.M.A. past carried on, negatively, into the new endeavour was in respect of certain former associates who evidently came with him into that new endeavour. If Funding World was meant to be a sort of lifeboat into which he lowered himself in order to escape from the floundering I.M.A., he should have been more careful whom he let aboard. Some of the fauna also anxious to leave the sinking ship (and who now leaped aboard the new endeavour) turned out to be quite unsavoury and it is surprising that Bacht failed to exercise better judgement in permitting this. When, in April, 1980, after he'd been president and, we gather, chief executive officer, of Funding World for some 26 months, he received a call from two investigating officers of the Peel Regional Police at his office in Burlington, he professes to have been surprised.

The facts alleged at paragraphs 14 and 20 (8) of the Registrar's Notice of Proposal were not disputed at the hearing by Mr. Bacht and the Tribunal accepts that the allegations contained in these paragraphs are probably substantially accurate. They deal with matters also involved in the Tribunal's earlier and recent decision in the case of Castlekeep Real Estate Limited. Matters relating to possible criminal proceedings against certain parties are touched upon here. The Tribunal will not, in the course of these reasons exhaustively review these malfeasances other than to say (1) We do not find, on the evidence adduced at the Hearing that Bacht participated in the "scheme" referred to and alleged to have been a scheme to defraud in which some of Bacht's subordinate associates were involved. (2) We are not satisfied, on the evidence, that Bacht can be excused from some measure of responsibility or vicarious liability for the misdeeds of persons employed by or associated with Funding World or subordinate to him, presumably responsible to him and under his authority, during the time he was President and principal executive officer of that company.

Be it noted, however, that there is no proof that Bacht personally and directly committed any misdeeds which were the subject of the police case, wrongdoings in respect of which Detective Parkinson testified that reasonable and probable grounds for the laying of criminal charges are believed to exist. Bacht cross-examined Detective Parkinson asking three succinct questions:

During your investigation - you spoke or interviewed many persons in connection with the alleged wrongdoings of Mr. Phinney, 419643 Ontario Limited, the Phinney/Silver/Joliffe

Company and certain Real Estate Agents and Brokers. Did you or your partner come across any evidence that would suggest:

- a) That Mr. Bacht participated in these wrongdoings?
- b) That Mr. Bacht had condoned such wrongdoing?
- c) That Mr. Bacht had any knowledge of such wrongdoings?

and he received a succinct answer to each: "No".

The same questions also got the same answer from Mr. Douglas Greenwood, the Ministry inspector.

Accordingly, therefore, while we find a substantial measure of vicarious responsibility, the Tribunal does not fully accept the Registrar's second Reason for his proposal, that "Creditmart is a corporation and the past conduct of its officer (President) and director... Josef Bacht affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, within the meaning and contemplation of section 5 (1)(c)(ii) of the Act". What we hold is that there exist reasonable grounds for belief that the present Applicant's business may not be so conducted. This is a lot less than full acceptance of the Registrar's submission but is meant to indicate a reservation on the part of the Tribunal, not so much as to Mr. Bacht's honesty as to his ability to govern situations for which he is responsible. Commercial Registration or licence to do business in a particular industry imposes a duty of care upon the recipient, a duty to accurately protect members of the public from any injury - such as an injury from fraud, dishonesty or incompetence - which could foreseeably result from operations so . It is not enough to say "As soon as I heard from the police that they were preparing evidence against my subordinates I resigned from the seniormost position and left". The person or persons effectively in control of a company must exercise that control in an effective manner and with diligence. It is their duty, on behalf of the community in whose name the licence or registration is granted, to ferret or sniff-out wrongdoing in the company's operations, not just by themselves, not just in respect of things they cannot help noticing, but in respect to things that are done covertly, by their employees and all others for whose conduct they are responsible or into whose conduct they have a duty to enquire. And if that duty is not performed with diligence, integrity and competence to a

reasonably adequate degree of effectiveness - by which term (reasonably adequate) we mean a very high degree ("competence" to include the possession of and ability to deploy good judgement) - then the registrar, in the view of the Tribunal, is fully justified in propounding a proposal to terminate or refuse to renew that company's registration.

In the present case our credence concerning Mr. Bacht's alleged innocence in respect to both I.M.A. and (particularly) Funding World is stretched to the utmost. To have lost one corporate presidency in the circumstances recounted may have been a misfortune; to have lost both savours of indiscretion.

We shall turn briefly to the two remaining Reasons stated in the Notice of Proposal, Reasons one and three. In the Tribunal's view it is possible and probable that these problems can be controlled by the imposition of conditions. Bacht is presently a conditionally discharged bankrupt. However, his wife Hannelore Bacht retains substantial assets which are available to Bacht's future operations and those of the Applicant (if permitted) and Bacht himself possesses both experience and very considerable technical competence. The witnesses called on his behalf were impressive. We would like him to have one more chance to justify their confidence. His experience, referred to, has now been supplemented both by his bankruptcy and by the proceedings herein; possibly, we think, beneficially. His intelligence (as distinct from judgement) is high, certainly sufficiently to offer promise.

Very seriously bearing upon the Tribunal's deliberations has been the very just and hallowed principle, often cited in similar cases, that a man's livelihood ought not lightly to be denied him. Josef Bacht has spent what could be described as the greater part of his productive life in the mortgage industry and is now neither young nor old. Mortgage work is what he knows best and does best. He is well-laden with the personal and family responsibilities which are usual in middle life. There is a strong willingness by the Tribunal to offer him a final chance provided adequate conditions can be devised. The following Terms and Conditions for renewal are the result of our deliberations. By virtue of the authority vested in it by the Mortgage Brokers Act, the Tribunal now Orders and Directs that the Registrar of Mortgage Brokers shall forthwith renew the registration of the Registrant under the Act provided that the following Terms and Conditions be strictly observed for and during the period of time (save as to

condition 9 hereunder) commencing forthwith and ending at the end of June 30, 1983, that is to say, as follows:

1. Josef Bacht be appointed the "recognized officer" of the Applicant corporation responsible for all brokerage activities both financial and legally under the Act.
2. James Wheeler may remain as President if he meets the requirements of the Registrar in the registration of Creditmart and be also responsible for the financial and operational activities of the firm as a Mortgage Broker to protect the public interest at all times. In the event of his resignation the office of the President will be assumed by Josef Bacht.
3. If Hannelore Bacht is knowledgeable in mortgage or able to be active in the brokerage operation either financially or as a measure of economy, then she may stay on as a mortgage salesperson or agent.
4. No other employees or changes in personnel or the corporation be made without the written consent of the Registrar or the licence shall be cancelled immediately.
5. The Applicant's operations shall be limited to one office and any change of location, to be approved by the Registrar.
6. All Rules and Regulations prescribed by the Act shall be strictly adhered to e.g. Trust Bank Account, placement of private funds, loan arranging, buying and selling mortgages.
7. Registrar to inspect operations at their discretion, from time to time i.e. 2/3 months.
8. Josef Bacht restricted to operating under the present arrangement i.e. C.M.F.C. licence only.
9. This order shall be further conditional upon Hannelore Bacht, the only shareholder in this application, providing to the Registrar an undertaking, in writing within 14 days of the date hereof, not to sell, assign, revise or dispose of her share and ownership part in the Application Corporation for the said period.

The Tribunal further Orders and Directs that the Registrar shall monitor the strict and diligent implementation of these terms and conditions by the applicant, its directors and shareholders and immediately move to revoke the registration hereby conditionally continued upon evidence sufficient to him of any breach thereof during the currency of the same.

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under the Mortgage Brokers Act, Section 7 the Tribunal Orders and Directs that the registration of the Applicant shall not be refused or withheld and shall be permitted to continue in accordance with Terms and Conditions.

IN THE MATTER OF THE MORTGAGE BROKERS ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 295

AND IN THE MATTER OF 364112 ONTARIO LIMITED
(SECURITY MORTGAGE SERVICES)

ALLAN SILVER
WILLIAM PHINNEY
BRYAN GUERTIN
DONALD CASE

Claimants

and

REGISTRAR OF MORTGAGE BROKERS

Respondent

RECORD OF AGREEMENT

The Tribunal records pursuant to Section 4, paragraph (a) of the Statutory Powers Procedure Act that the proceeding in this matter is hereby disposed of by agreement of the parties upon the terms and conditions set out in an Agreement and Undertaking on behalf of the Applicants dated the 2nd day of March, 1982, and agreed thereto by letter dated the 23rd day of March, 1982, on behalf of the Respondent.

SPIDER FINANCIAL CORPORATION LIMITED
ANTHONY DIAMANTOPOULOS

APPEAL FROM THE PROPOSAL OF THE REGISTRAR
OF THE MORTGAGE BROKERS ACT

TO REVOKE AND TO REFUSE TO RENEW THE APPLICANT'S
REGISTRATION AS A MORTGAGE BROKER

TRIBUNAL: MARY JANE BINKS RICE, VICE-CHAIRMAN as CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
MURRAY SUSSMAN, MEMBER

COUNSEL: PELL CAPONE, representing the Applicants
PETER J. WILEY, representing the Respondent

DATE OF
HEARING: NOVEMBER 25, 1981

REASONS FOR DECISION AND ORDER

Spider Financial Corporation Limited herein referred to as "Spider" is a company incorporated under the laws of the Province of Ontario having its head office at 501 Yonge Street, Suite 230, Toronto. Anthony Diamantopoulos is and has been at all material times the sole officer, director and shareholder of Spider. Spider carries on business as a mortgage broker from offices located at 720 Spadina Avenue, Toronto. Spider has been registered as a mortgage broker under the Mortgage Brokers Act since November 2, 1979.

Spider first applied for registration as a broker under the Mortgage Brokers Act by application dated October 22, 1977 completed and submitted by Diamantopoulos on behalf of Spider. Diamantopoulos indicated in answer to Question No. 10 on the form that there were no unpaid judgments outstanding against himself and Spider and the form was sworn to by Diamantopoulos. Diamantopoulos subsequently applied for renewal of Spider's registration by application dated June 2, 1980. A routine search of executions, conducted by the Registrar's office on June 19, 1980, disclosed that there were eight (8) judgments outstanding against an "Anthony G. Diamantopoulos" totalling \$34,704.12 without consideration of interest.

On December 5, 1980, W. Stoddart, Assistant Registrar of Mortgage Brokers sent a registered letter to Diamantopoulos wherein he referred to the writs of execution and requested Diamantopoulos to provide satisfactory proof that he was not the person named in the writs. Alternatively, he required that Diamantopoulos provide an explanation as to why the judgments were not disclosed on the application for registration. On December 22, 1980 Diamantopoulos replied, denying that the debts were his and stating that he believed that the debts were incurred by a relative having the same name as his. The Assistant Registrar sent another registered letter to Diamantopoulos on January 7, 1981 stating that before any determination could be made regarding Spider's application, Diamantopoulos must supply the Ministry with sworn affidavits from the creditors or their solicitors to the effect that Diamantopoulos was not the person against whom the judgments were recorded. Diamantopoulos replied to Stoddart by letter dated January 8, 1981 explaining that letters had been sent to the various creditors for a statement of account regarding the judgments. In a further letter to Stoddart of February 2, 1981 Diamantopoulos advised that his uncle had confirmed the judgments to be his. Diamantopoulos later provided Stoddart with three (3) telex messages each dated February 20, 1981 purportedly from his uncle, Antonios Diamantopoulos, one of which was an offer of settlement to creditors which was actually taken at face value by some of the creditors and acted upon by them. Mr. Stoddart attempted to arrange a meeting with Diamantopoulos to discuss the matter but was unable to set up such a meeting with Diamantopoulos.

Diamantopoulos submitted a further application for renewal on behalf of Spider in respect of the current registration period on May 25, 1981 but the application was apparently not accepted as it was not accompanied by an audited financial statement. An application was again submitted on August 19, 1981 without an audited financial statement and on the same date a form letter from the Registrar advised Spider that its application for renewal had not been received and the registration had lapsed. Diamantopoulos subsequently submitted a completed application for renewal, together with an audited financial statement on September 2, 1981 in which Diamantopoulos again swore that there were no judgments against him.

It is admitted by counsel for the applicants that the person named in the judgments and writs of execution is in fact the applicant and the judgments are related to debts incurred by him in his business ventures. There is also no question that the evidence discloses a strenuous effort by some of these creditors to collect the money - including judgment debtor examinations and at one point a committal to jail.

On June 22, 1981 A. Binstock, Registrar of Mortgage Brokers, had caused to be served on the applicants a notice of proposal to revoke registration on the following grounds:

- (a) Having regard to its financial position the company could not reasonably be expected to be financially responsible in the conduct of its business;
- (b) The past conduct of its officer and director affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.

The Tribunal is of the opinion that counsel for the Ministry has lead more than sufficient evidence on both grounds to convince the Tribunal that registration should be revoked forthwith.

Dealing with the financial position of the company the Tribunal has no doubt in its mind that it is appropriate in considering a company's financial situation, to consider the financial picture of the shareholders. In this case, Spider has but one shareholder. This shareholder has no assets and judgments in excess of \$35,000.00 all with interest mounting daily on this large amount. Over and above these debts, the Tribunal was also informed that Mr. Diamantopoulos owed his family several thousand dollars. The Tribunal is of the opinion that should the creditors become aware of the erroneous representations to them at the time of settlement, the settlements would easily be set aside. Even in the applicant's testimony before the Tribunal, there was no programme presented to the Tribunal as to how Mr. Diamantopoulos would meet his creditors or that he even was genuinely desirous of discharging his debts.

The Tribunal is of the opinion that in the absence of Mr. Diamantopoulos demonstrating a viable programme of attacking his debts, which we concede would be very difficult given his financial situation, that his financial situation is too precarious to permit him to responsibly conduct his financial affairs and that his past conduct with his creditors is far too cavalier.

As to Mr. Diamantopoulos' past conduct, the counsel for the Ministry led evidence without contradiction from the applicants of a startling picture of deliberate deception in the applicant's dealings with the Registrar. The Tribunal

finds that it was only when he was completely cornered with the truth through the Ministry's investigation that the applicant admitted his debts. The past conduct of the applicant in meeting his debts is one of evasion. The past conduct of the applicant in dealing with the Registrar is one of complete and total dishonesty.

For the foregoing reasons, the Tribunal directs the Registrar to carry out his proposal to revoke and to refuse to renew the registration of the applicants.

PIETRO AMATO
[PETE'S AUTO REPAIRS]

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION OF THE APPLICANT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY L. SINGER, MEMBER
MURRAY FELDMAN, MEMBER

COUNSEL: JERRY F. O'BRIEN, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING
DATES: July 15th, 1982

REASONS FOR RULING

Mr. O'Brien tendered a document as an exhibit. It was numbered by the Registrar. Mr. O'Brien then decided to withdraw the document. The Tribunal so directed.

The Tribunal held: If Mr. O'Brien wishes to refer to it, it must be filed as an Exhibit; if he is not going to refer to it, it will not be filed as an Exhibit.

The assigning of a number is merely a technicality that is used for the purposes of assisting the dealing of the matter. If there has been presented a document, one is enabled to withdraw it before anything had been done with it.

PIETRO AMATO
[PETE'S AUTO REPAIRS]

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATION OF THE APPLICANT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY L. SINGER, MEMBER
MURRAY FELDMAN, MEMBER

COUNSEL: JERRY F. O'BRIEN, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING
DATES: July 15th, 1982

REASONS FOR RULING

With respect to Application for Adjournment, counsel for the Applicant stated that proceedings will be commenced which will challenge the jurisdiction of the Tribunal and that the Tribunal should adjourn its proceedings until that has been dealt with by another authority.

The Tribunal is of the opinion that it should proceed in the matter and that Re Cedarvale Tree Service (22 D.R.L. 3rd 40) cited by counsel for the Respondent can be the basis of that finding.

With respect to jurisdiction, counsel for the Applicant submits that the Tribunal has no jurisdiction because certain of the reasons forming the basis of the Notice of Proposal were the basis of certain charges dealt with in a Provincial Court in respect of which there were acquittals. The Tribunal does not agree. The procedure before the Tribunal is a procedure set out in the relevant Acts and is completely independent of any other proceedings in which jurisdiction is given to other authorities. The Tribunal is required to deal with the matters placed before it. The Tribunal is of the opinion that Re Imrie and Institute of Chartered Accountants of Ontario, 1972 - 3 O.R. 275 cited is applicable; that proceedings in that case were criminal is not a basis for a distinction. Counsel for the Respondent has cited section 11(h) of the Constitution Act 1982 which was passed subsequent to the Imrie decision. The Tribunal is of the opinion that section 11(h) is not applicable to the proceedings before the Board nor this Tribunal. The Applicant is not being "tried again". The Tribunal deals with certain reasons forming the basis of administrative action to be taken.

MARSHALL N. ARCHER and
MARSH ARCHER MOTORS LTD.

APPEAL FROM A PROPOSAL
OF THE REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO REGISTER THE APPLICANTS
AS A SALESMAN AND A DEALER RESPECTIVELY

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
HERBERT A. KEARNEY, MEMBER

COUNSEL: SUSAN J. BRENNER, representing the Applicants
PETER J. WILEY, representing the Respondent

HEARING
DATE: May 5th, 1982

REASONS FOR DECISION AND ORDER

The Applicant Marshall N. Archer (hereinafter referred to as Archer) is 58 years old and resides in Barrie, Ontario. Marsh Archer Motors Ltd. (hereinafter referred to as the Company) was incorporated under the laws of the Province of Ontario on March 26th, 1973, and Archer has been the sole officer, director and shareholder of the Company since the date of its incorporation.

Archer first became registered to carry on business as a motor vehicle dealer in April 1965 having been in the car business for sometime prior. The Company first became registered to carry on business as a motor vehicle dealer in October 1973; Archer became registered as a salesman to the Company.

The Company did not file for renewal after December 31st, 1977. Both the Company and Archer subsequently again became registered as dealer/salesman effective July 17th, 1979 carrying on business involved in the purchase and sale of used cars at the wholesale and retail level. Archer was actively and directly engaged in the business.

As a result of investigations carried on in November 1980, charges were laid against the Company and Archer on December 9th, 1980. The charges in question related to 9 motor

vehicles which were sold wholesale and 11 motor vehicles which were sold retail to the public, between June 1979 and September 1980. The details with respect to the automobiles in question are set out in summary sheets (Exhibits 5(a) and 5(b)).

Neither the Company or Archer applied for renewal of registration by the end of December 1980 and as a result both registrations came to an end as of the 31st day of December, 1980. On March 10th, 1981, both the Company and Archer were convicted in the Provincial Court in Barrie of charges of fraud related to the alteration of odometers on motor vehicles. Archer was convicted and fined \$4,000.00; the Company was fined \$2,000.00.

The Company and Archer have applied for registration as dealer/salesman. The applications for registration indicate that Archer is again the sole shareholder, director and officer of the Company. The Registrar has issued a Notice of Proposal (Exhibit 4) to refuse the registrations for reasons related to the convictions.

The application that the Proposal not be proceeded with is based on a submission that the Applicant Archer's behaviour since he was charged with fraud shows his desire to rehabilitate himself. Archer stated that he is now rehabilitated and will conduct himself and his business in accordance with law and with integrity and honesty. The consideration of rehabilitation is to be based on submissions respecting the payment of substantial fines, restitution, humiliation, and desire to re-establish himself in a business in which he again can be gainfully employed.

In reviewing the course of conduct of Archer since his re-registration in July 1979, the Tribunal notes that Archer entered on the course of conduct involving the fraud from the very beginning of his re-entry into the business, and continued during a period of over a year; and that the sales of cars were accompanied by repainting and replacement of tires. As counsel pointed out, there is no prohibition and such items can be done in the ordinary course of the conduct of a used car business. However, the Tribunal is of the opinion that the related actions constitute a course of conduct which was calculated to cover-up (whether there be need or not) the state of the vehicle. Under the circumstances, the public could not make a judgment on what it saw - trust based on what was seen was ill-founded.

The Tribunal has stated its opinion on a number of occasions of the seriousness of tampering with odometers. It has made its message loud and clear. The public has a right to believe that that message will be heeded.

Counsel for the Applicant has ably put the Applicant's case in the best light. However, the Tribunal is of the opinion that if restitution is one of the bases for favorable consideration of the application - it is based on weakness. The restitution given was long in coming, and did not stem from any initiative on the part of Archer - it was only in response.

The Registrar's action must be made upon a judgment as to the proper action to be taken at the time of the application. It is not an easy one. It is not easier to be arrived at at the Tribunal level.

The Tribunal notes the confidence that citizens and associates in business have in the Applicant Archer. The Tribunal, however, must act in the broader context of the public generally, and of the industry as a whole.

The Tribunal finds that the past conduct of Archer affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. The Tribunal finds that the conduct of the sole officer and director of the Company, namely Archer, affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.

The Tribunal notes, as has been pointed out by the Registrar, provisions of the Section relating to a further application upon new or other evidence or where it is clear that material circumstances have changed. The Tribunal notes further that the Registrar can consider an application by Archer unrelated to a dealer/applicant of which he is a director.

By virtue of the authority vested in it under the Motor Vehicle Dealers Act, Section 7, the Tribunal directs the Registrar to carry out his proposal in respect of each of the Applicants.

RICHARD G. BRENNER

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO REGISTER THE APPLICANT

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
W. W. EVANS, MEMBER
WILLIAM J. GUIGNION, MEMBER

COUNSEL: HOWARD P. EISENBERG, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING

DATE: March 30, 1982

REASONS FOR DECISION AND ORDER

Richard Grant Brenner has applied for registration as a motor vehicle salesman. The Registrar of Motor Vehicle Dealers and Salesmen has refused his application and Mr. Brenner has appealed from that decision to this Tribunal.

The Registrar's reason for refusal to register is based on Section 5(2) of the Act which reads:

An Applicant is entitled to registration or renewal of registration by the Registrar except where the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Mr. Brenner has an extensive criminal record dating back to 1959, the year in which he attained the age of 16 and may be summarized as follows:

June 1959	- Theft
August 1960	- Assault, bodily harm
February 1962	- Assault, bodily harm
December 1962	- Attempted armed robbery
October 1966	- Common assault
February 1967	- Impaired driving
July 1971	- Caused disturbance
November 1972	- Possession of a restricted drug

September 1973	- Possession of a restricted drug
November 1974	- Breach
October 1975	- Possession of narcotics
January 1977	- Possession of credit cards and use of credit cards
January 1979	- Theft over \$200.00
January 1979	- Fraud

All these offences occurred in Windsor, Ontario with the exception of the last which occurred in Detroit, Michigan.

Additionally, he has a judgment against him for some \$12,500.00 as evidenced by Exhibit 10, a Sheriff's Certificate of recent date.

Mr. Brenner has been in and out of trouble all his life. He is in debt. His marriage, we have heard, has resulted in failure.

In the case of Michael Dupuis and the Registrar of Motor Vehicle Dealers and Salesmen, released on March 2nd, 1978, this Tribunal, (J.C. Horowitz Q.C., Chairman,) stated in its decision, which is binding on us, as follows:

The Tribunal has stated before and now repeats that the object of the legislation under which the Tribunal acts is the public interest and a motor vehicle salesman must be a person of complete honesty and integrity. He has occasion to handle cash, cheques, documents and makes representation to customers.

In the case of Re: Herman Motors and Registrar of Motor Vehicle Dealers, reported at 29 O.R. (2d) at p. 431, a decision dated July 2nd, 1980, the Honourable Mr. Justice Peter Cory stated (at the bottom of page 433 and continuing to the top of page 434) that "in the experience of mankind, when assessing the probable future actions of men, some reliance may properly be placed in the past acts of the individuals to be assessed".

In the case before us a Mr. Paul Winkler, who operates a business called J & B Auto Wreckers (Essex) Limited, has offered Mr. Brenner employment as a used car salesman. Mr. Winkler's business consists of dismantling and recycling cars. He also is a registered motor vehicle dealer. Last year he sold 37 cars. He has testified that he trusts Mr. Brenner. Mr. Winkler's business is bonded.

Mr. Donald Tait, a barrister of high repute at the criminal bar in this community has come forward and has given evidence on behalf of the Applicant Brenner. He is under no illusions that Brenner has behaved well in the past. But a very busy man, he has come here today and he has stated under oath that he believes the Applicant Brenner has seriously embarked on a rehabilitation program and has turned over a new leaf. He has told us that the Windsor police have exhibited a very great interest in him and were surprised to learn that he has been out of trouble for the past 17 months. "We haven't heard from him and supposed he was in jail" an officer in effect, is quoted as having said.

The Tribunal heard evidence from the Applicant himself both direct and upon cross-examination. He said he wanted the registration he has applied for in order to "upgrade" himself.

Mr. Winkler, who recycles wrecks, says he trusts him and wishes to have him in his business.

Mr. Winkler must know that the presence of the Applicant on his lot would surely guarantee the lively attention or attentions of the police towards his operation. Mr. Winkler, who himself has no criminal record and has never been in jail, in undertaking to give the Applicant employment, has voluntarily undertaken to place himself in a very exposed position, a position in which he and his business would be exposed not only to any dishonesty of Mr. Brenner should it recur, but also to detection by the police of any dishonest activities of any kind taking place on his premises. Mr. Winkler, himself a Registrant, is sticking his neck out.

This being the case, the Tribunal has decided that possibly Brenner will in the future be a person of honesty and integrity within the meaning of the dictum of Horowitz, Q.C. in the Dupuis case cited, and also within the limit area of operations or scope for injury to the public provided by the J & B operation - an area of operation which we believe will be further limited by the self-interested surveillance of Mr. Winkler and the close scrutiny of the police who are certainly under no illusions about Mr. Brenner.

We believe that the special circumstances of this case, referred to in the preceding sentence, distinguish this case from all others.

We believe that Mr. Brenner should upgrade himself. We think he would feel better if he could do this. He is not alone in his desire to do so. We are willing to encourage that objective.

Consequently, the Tribunal hereby Directs that the Registrar shall allow conditional registration to the Applicant for a period of six months, and provided that the Registrar shall have heard no unfavourable report concerning him (the words "unfavourable report" to be interpreted by the Registrar, for the purposes of this Order at his uncontrolled and complete discretion). Such registration shall then become permanent within the meaning of the Act. But such registration shall be subject to the further condition that it shall take effect only for as long as the Applicant shall remain in the employ of J & B Auto Wreckers (Essex) Limited and shall extend only to the Applicant's functions or operations conducted in the course of that employment and on that company's business premises.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

RONALD BRUNET

APPEAL FROM A PROPOSAL OF
THE REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO REGISTER THE APPLICANT
AS A MOTOR VEHICLE SALESMAN

TRIBUNAL: JOHN YAREMKO, Q.C., Chairman
HELEN J. MORNINGSTAR, Member
HERBERT A. KEARNEY, Member

COUNSEL: RONALD BRUNET, appearing in person

PETER J. WILEY, representing the Respondent

DATE OF
HEARING: May 26, 1982

REASONS FOR DECISION AND ORDER

Ronald Brunet, the Applicant, was registered as a motor vehicle salesman under the Motor Vehicle Dealers Act with Parkway Country Dodge Chrysler from July 12th, 1978 to December 31st, 1978 at which time the registration terminated. Ronald Brunet was then re-registered as a motor vehicle salesman with Art Menard Garage, on March 1st, 1979 to June 20th, 1979 at which time he transferred his registration to R.B. Motors, operated by his father Rheal Brunet.

On the 12th day of March 1980, Ronald Brunet pleaded guilty to a charge that during the year 1979 in the United Counties of Stormont, Dundas and Glengarry and elsewhere in the Province of Ontario, he unlawfully did, by deceit, falsehood or other fraudulent means defraud the public of more than \$200.00 in money by selling automobiles, the odometers on which had been tampered with to conceal the actual miles the vehicles had been driven, contrary to section 338(1) of the Criminal Code.

Particulars with respect to the mileage being reduced on the odometers of 9 vehicles in which the Applicant was directly involved is set out in Exhibit 9A. Art Menard, the dealer was also convicted of charges relating to odometer tampering. It is to be noted that one of the transactions involved a car purchased by Brunet on March 3rd, 1979 - 2 days after commencing work with Art Menard Garage.

In May 1980, the registration of the Applicant was revoked based on the details of the conviction referred to.

On the 20th of July 1981, the Applicant filed an application for registration which is the subject matter of the Registrar's Notice of Proposal and the subject matter of this hearing. The Certificate of Employer thereon relates to a registrant Olympic Auto Sales operated by one Guy Gratton.

The Registrar has issued a Notice of Proposal (set out in Exhibit 4) to refuse the registration. By letter dated May 17th, 1982 the Registrar advised the Applicant (as set out in Exhibit 11) that in addition to the matters referred to in the Notice of Proposal that the Registrar

"...will also be taking the position at the hearing that under all of the circumstances, Olympic Auto Sales (your intended place of employment) would not be a suitable employer in your case."

Olympic Auto Sales is operated by the said Guy Gratton. The operation which appears secondary to another business, Guy's Auto Body Shop, involves generally the wholesaling of cars, which business was the activity engaged in a good measure by Brunet, when in the employ of Art Menard. The vehicles referred to in the earlier Exhibit relate to several vehicles purchased and sold through auto auctions.

The Tribunal has time and time again recorded its view of the seriousness of odometer tampering and the fraud that is thereby performed on the consumers who have no opportunity of protecting themselves and who are in even a more difficult position where a wholesale operation has taken place. The Tribunal views the past conduct of the Applicant in the light of his intended field of employment and operation, and concludes that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity or honesty.

The Tribunal also records the view that the application forming the basis of the appeal is no longer a valid application. There is great doubt whether the employment certificate forming a significant part thereof has any validity at this point in time. Not only has the Applicant not updated the same, (he was in contact with the prospective employer very recently,) but he has himself in testimony called into question the continuation of the operation by virtue of his awareness of the going out of business of the operator thereof.

The Tribunal brings to the attention of the Applicant Section 8 of the Act which states:

"A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

For the reasons set out herein, by virtue of the authority vested in it under the Motor Vehicle Dealers Act, Section 7, the Tribunal directs the Registrar to carry out his proposal.

MOTOR VEHICLE DEALERS ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 299

IN THE MATTER OF the application for REGISTRATION of
RICHARD BUGOW
as motor vehicle dealer

AND IN THE MATTER OF the PROPOSAL of
the Registrar of Motor Vehicle Dealers and Salesmen
made pursuant to Section 7(1) of the Motor Vehicle
Dealers Act
TO REFUSE THE REGISTRATION.
-Proposal dated: 30th day of July, 1982

AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal pursuant to Section 7(2).
-Requirement dated: 12th day of August, 1982, by

RICHARD BUGOW

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

BEFORE:

Mary Jane Binks Rice, Vice-Chairman as Chairman
Helen J. Morningstar, Member
Herbert A. Kearney, Member

Upon the matter coming before the Commercial Registration Appeal
Tribunal on the 17th day of November, 1982, in the presence of:

Richard Bugow, appearing in person

Peter Wiley, representing the Respondent

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 7(5) of
the Motor Vehicle Dealers Act,

The Tribunal directs the Registrar to refrain from carrying out
his Proposal and to Grant Registration as a Motor Vehicle Dealer
to Richard Bugow subject to Terms and Conditions.

- (1) That registration be for a period of one year to be reviewed
annually for the next three year period.
- (2) That Lawrence Dumais stay on for a period of six months to
assist in the management of the business.

ANTONIOS ELIA

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT REGISTRATION AS A
MOTOR VEHICLE SALESMAN

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
HERBERT KEARNEY, MEMBER

COUNSEL: RONALD TAYLOR, representing the Appellant
PETER J. WILEY, representing the Respondent

HEARING
DATE: November 3rd, 1982

REASONS FOR DECISION AND ORDER

In the view of the Tribunal Mr. Abram's Proposal was not lightly made but made in due consideration of the facts and circumstances. The Tribunal does not believe he would make his Proposal without a fair and just assessment of all the proper circumstances. The Tribunal has heard the evidence and the arguments of counsel and does not find that there exist sufficient grounds for it to interfere with the Proposal the Registrar has made.

The circumstances of this case are such that through receiving a salesman's licence this Appellant would in practice be carrying on business as a dealer. It seems that the heart and brains of the operation, to adopt a phrase recently employed before us, would be those of the Appellant rather than those of his wife. For this as well as other reasons we feel that the present Appellant is not a suitable person to receive the registration sought at this time.

GERALD ELLISON

APPEAL FROM THE PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT REGISTRATION AS A MOTOR
VEHICLE SALESMAN

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
T. HOGAN, MEMBER

COUNSEL: MARSHALL SACK, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING

DATE: January 5, 1982

REASONS FOR DECISION AND ORDER

The purpose of this hearing has been to consider the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to refuse to register Gerald Ellison, the Applicant herein, as a motor vehicle salesman.

The reasons set out by the Registrar in his Proposal are that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, and also that the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business.

The principal allegations which have been brought against the Applicant in support of the Registrar's said Proposal may be summarized as follows:

1. That the Applicant has a previous criminal record.
2. That on occasion he failed to disclose, or to disclose fully and in adequate detail, the particulars of his criminal record or of criminal charges pending against him.
3. That he is a discharged bankrupt.

4. That certain criminal charges are currently pending against him.

During this hearing it was also alleged that the Applicant is presently in the midst of a second bankruptcy application and that he has been committed for trial on the charges pending against him which include a charge of conspiracy to defraud by deceit and falsehood, a charge of theft, a charge of extortion by violence and the threat of violence, and a charge of falsifying documents, inter alia.

The previous criminal convictions which the Applicant admitted included, inter alia, car theft, possession of an unlicensed firearm, and two convictions of robbery. Some of these convictions took place when the applicant, now almost 40, was a much younger person and the current charges against him have not been disposed of, one way or the other.

Section 3(1)(b) of the Motor Vehicle Dealers Act R.S.O. 1980, chapter 299, as amended, reads in part as follows:

3(1) No person shall...

- b) act as a salesman of or on behalf of a motor vehicle dealer unless he is registered as a salesman....under this Act...

Section 5(1) (a) and (b) of the said Act read as follows:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
- b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

It was argued on behalf of the Applicant that Section (1) subsections (a) and (b) apply only to an applicant for a dealer's or dealership registration not to an applicant for a salesman's registration. The Tribunal finds to the contrary.

It finds that a motor vehicle salesman must also, in the intention of the Act, fulfil these two requirements, although we allow that the standard required of a dealer will probably be higher than that to be expected of a salesman and commensurate with the relative degree of responsibility exercised by the former in his or her dealings with the public. A motor vehicle salesperson is, in our view, required under law to be someone whose past conduct affords reasonable grounds for belief that he or she will function in accordance with law and with integrity and honesty, although that standard, as we have been told by counsel, may not have been specifically imposed by the Legislature upon other salespeople, e.g., clerks in department stores. Perhaps this is because the latter category of salespeople have less opportunity to inflict serious harm upon members of the consuming public than experience has shown is the case with salespeople in the car industry. We don't know. But we find that the Legislature has, in fact, so enacted and that it is the duty of the Tribunal to satisfy itself that the requirements of this section are met, not just as to honesty and integrity but also in respect to financial responsibility - although the strictness or severity of the requirement in respect of the latter will be commensurate with circumstances and with the type of registration sought in a given case. Strict financial responsibility will be more important in the case of a dealer, particularly that of a large volume dealer, than in the case of a salesperson.

In the instant case the degree of personal financial responsibility to be involved, on the part of the Applicant, may indeed be minor, but we are satisfied both from the evidence of judgments against him totalling over \$100,000.00 and from the fact that he is currently in the midst of his second bankruptcy that he is scarcely a man who may reasonably be expected to conduct himself in a financially responsible manner. Apart from all else his present financial circumstances could quite possibly, in the Tribunal's view, expose him to stresses which, coupled with what we may call his demonstrated past predelection to dishonesty, could possibly put the public at risk.

The Applicant impresses the Tribunal as a person whose integrity is extremely dubious. We feel that he ought to have made a fuller and more adequate disclosure in the previous applications he has made for registration of his various criminal convictions. We find that he ought to have been more specific and candid in his disclosure to the Registrar of criminal charges pending against him and as to the state of his finances. In particular we feel that he ought to have told the

Registrar when he filed his second application for bankruptcy sometime during the period when his present application for registration was and remained pending.

The Tribunal is well aware of the presumption of innocence which is the principle of criminal law and has no inclination to judge or prejudge the issue before the Courts of criminal justice. Nor have we any desire, intention or jurisdiction to punish him for anything. But as stated by this Tribunal in previous decisions, the Tribunal considers that its duty is to protect the public. This is its primary function in the discharge of its jurisdiction and discretion under the legislation pursuant to which we have considered the present case.

Having read the Notice of Proposal of the Registrar of Motor Vehicle Dealers and having read and heard what has been adduced in evidence at this hearing, it is the decision of the Tribunal that the said Proposal shall be upheld and the Tribunal orders accordingly. However, the Tribunal reminds the Applicant of the provisions of Section 8, which reads as follows:

"A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

Should the criminal proceedings which are presently pending against the Applicant result in his complete exoneration, or substantial acquittal, we have no doubt that the Registrar would be willing to consider a reapplication by this Applicant at a later date.

KENNETH G. FLARO c.o.b. as
KEN'S AUTO SALES

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY L. SINGER, MEMBER
HERBERT KEARNEY, MEMBER

COUNSEL: KENNETH G. FLARO, appearing in person
PETER J. WILEY, representing the Respondent

HEARING May 25th, 1982
DATES: September 2nd, 1982.

REASONS FOR DECISION AND ORDER

The Applicant was previously registered as a motor vehicle dealer and as such he failed to record odometer readings contrary to Section 16(2)(0) and Section 16(3)(g) of Ontario Regulation 98/71 under the Motor Vehicle Dealers Act, and on the 4th day of March 1980 was convicted thereof. (On that date the applicant had voluntarily surrendered his motor vehicle dealer registration.)

The failure to record related to vehicles which were the subject of odometer tampering and in respect of which the father of the Applicant, one Lloyd George Flaro was convicted under the Criminal Code Section 338.

The Tribunal finds that though the Applicant was at the time registered as dealer the purchases and sales of the vehicles in question were generally done by the father, who was directly responsible for the tampering and who was not registered in any way under the Act.

The Tribunal finds that at the time the offences occurred the Applicant was under the direct influence of his father the said Lloyd George Flaro. The Tribunal notes that the Applicant proposes to reestablish his business at the former operation, i.e. the premises of his father, and that the two year restriction in respect of the father with respect to any dealings directly or indirectly with vehicles (automobiles, trucks, motorcycles, etc.) imposed by the Judge has now expired.

and that the said Lloyd George Flaro is free to do so. In short, the operation the Applicant is contemplating is exactly the same as before. Under the circumstances, the Tribunal finds that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal draws the Applicant's attention to Section 8 of the Motor Vehicle Dealers Act:

" A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his proposal.

GILFORD GARAGE SERVICE LIMITED and
THEODORE AMBURY

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT THE REGISTRATIONS OF THE
APPLICANTS

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
HERBERT KEARNEY, MEMBER

COUNSEL: STANLEY LETOFSKY, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING
DATE: September 30th, 1982.

REASONS FOR DECISION AND ORDER

Messrs. William Hudson and Theodore Ambury are officers and directors of Gilford Garage Service Limited which has applied for registration as a motor vehicle dealer, and Theodore Ambury has applied for registration as a salesman in respect thereof.

In respect of the application of Gilford (Exhibit 5) signed by Hudson and Ambury, to the question:

"Has the applicant ever been convicted under any law of any country, or state, or province thereof of an offence or are there any proceedings now pending?"

the reply was "No".

In this regard the Tribunal notes that in accordance with the Instructions to Public at the head of the application there is stated:

"For the purposes of this form, the term "applicant" means a sole proprietor, any partner of a partnership, or any officer or director of a corporation."

In respect of the application of Ambury to the question:

"Have you every been convicted under any law of any country, or state, or province thereof, of an offence or are there any proceedings now pending?"

the answer is given "Yes". To the continuation thereof:

"If yes, give full particulars:"

there is given the reply "Cause a disturbance Pending"

In fact, the Tribunal finds there were two convictions registered against Hudson in respect of offences committed as recent as 1979 and 1980, and there were 4 convictions registered against Ambury - 1 as recent as 1977, and 1 back in 1972 in respect of which he had received a sentence of 9 months.

The Tribunal finds the answers to be false and incomplete. There have been given by Hudson and Ambury explanations in respect of the answers.

The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgment. He did not receive that in these instances.

The applicants (indirect and direct if I may use that distinction to differentiate between the type of 'applicant' set out in the instructions) did not give the answers they gave through inadvertence.

The applicants were aware that the questions were in respect of convictions. The Tribunal is of the opinion that they knew that there were convictions which were recent or of a nature that remembrance must be taken for granted.

The Legislature has set out that registration under the Act is related to a business which is to be carried on in accordance with law and with integrity and honesty. The Tribunal finds that the completion by the applicants of the applications is such as to give reasonable grounds for belief that in respect of these applicants there would be the contrary.

The Tribunal finds that in respect of the applicant Corporation Gilford the past conduct of its officers and directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, and that in respect of Ambury, as an applicant his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Accordingly by virtue of the authority vested in it under section 7 of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his proposal.

MAURICE HUANG

APPEAL FROM THE PROPOSAL OF THE REGISTRAR
OF MOTOR VEHICLE DEALERS AND SALESMAN

TO REVOKE REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, VICE-CHAIRMAN AS CHAIRMAN
HARRY L SINGER, MEMBER
HERBERT KEARNEY, MEMBER

COUNSEL: WILLIAM POPOVSKI, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING
DATE: July 21st, 1982

REASONS FOR DECISION AND ORDER

On November 19, 1981 the Applicant attended at the offices of the Ministry of Consumer and Commercial Relations and reported to the Metropolitan Toronto Police Force a complaint concerning his former employer Brimell Motors Limited claiming that the dealer sold motor vehicles which had false odometer readings. The Applicant also claimed that one of the salesmen had disconnected the odometer on a demonstrator vehicle which he had used and that this vehicle was subsequently sold to a customer by Brimmell.

The Applicant claimed as well that the assistant manager had sold a motor vehicle which had a false odometer reading. The police conducted an investigation of these charges.

The Tribunal finds that the Applicant made the claims knowing that these claims were extremely serious and damaging to the dealer; that there was no foundation to his claims; that these claims were made to damage the dealer, Brimell Motors Limited.

On December 16, 1981 the Applicant was charged with public mischief contrary to Section 128 of the Criminal Code concerning his allegations against Brimell Motors Limited and two individuals in its employment. On February 17, 1982 the applicant pleaded guilty to this charge. On March 16, 1982 Mr. Huang was given a conditional discharge and three years probation.

The Tribunal finds as a fact that although the offence is an isolated incident, that it was not an impulsive act and that it was perpetrated over a considerable period of time. The Tribunal finds that the Applicant's testimony was less than forthright and an explanation, in many aspects, of convenience.

The Tribunal finds that based on the foregoing there are reasonable grounds to conclude from the aforementioned conviction, the Applicant's testimony and his explanation that the Tribunal should be concerned with the Applicant's behaviour and accordingly his registration should be suspended for a twelve month period forthwith.

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under the Motor Vehicle Dealers Act, Section 7(4), R.S.O. 1980 and amendments thereto

The Tribunal directs the Registrar to vary his proposal and to suspend the registration of the Applicant, Maurice Huang, as a Motor Vehicle salesman pursuant to the said Act, for a period of twelve months forthwith at which time the Applicant may apply for re-registration.

304274 ONTARIO LIMITED
 C.O.B. JEFFREY BRANT MOTORS
 J. DeSAPIO SR.
 J. DeSAPIO JR.

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
 MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
 W. W. EVANS, MEMBER
 T. HOGAN, MEMBER

COUNSEL: NO ONE APPEARING for the Applicants
 PETER J. WILEY, representing the Respondent

HEARING
 DATE: January 27, 1982

REASONS FOR DECISION AND ORDER

The Proposal of the Registrar of Motor Vehicle Dealers and Salesmen which was the subject of this hearing was to revoke the registrations of the Applicant 304274 Ontario Limited as a dealer under the Motor Vehicle Dealers Act, R.S.O. 1980 c. 299 as amended and of the Applicants Joseph Anthony DeSapio Jr. and Joseph DeSapio Sr., respectively, as salesmen under the said Act.

The Applicants did not appear at the hearing nor were they represented either by counsel or otherwise. The Tribunal accepts as proven upon the evidence before it, namely Exhibit #2 herein, that the Applicants were all duly and properly served with notice of the hearing which was a hearing requested by the Applicants through their counsel, Wayne S. Anderson Esq., of the firm of Spencer, Anderson & Anderson of 171 Division Street, Welland, Ontario, who failed either to appear or, as we have heard from the Registrar of this Tribunal, to notify her of his intention not to appear.

The Tribunal heard the testimony of Robert Paul Carr, an officer of the Welland Detachment of the Royal Canadian Mounted Police, concerning an investigation of the business carried on by the Applicants which culminated in the conviction of the Applicant Joseph Anthony DeSapio Jr. on twelve separate counts of unlawfully altering the odometers of motor vehicles as was shown by certain Certificates of Conviction issued by the Provincial Court (Criminal Division) of the Judicial District of Niagara South at Welland and entered collectively as Exhibit 4 herein.

Officer Carr also testified that eight additional charges of the same crime were withdrawn at trial by the Crown as being redundant for the purposes of securing conviction. On the basis of the evidence before it the Tribunal accepts as proven that the Applicant Joseph Anthony DeSapio Jr. altered or permitted alterations to the odometer readings of the eight motor vehicles referred to in paragraph 10 (b) of the Registrar's Notice of Proposal as well as those mentioned at Paragraph 10 (a) of that Notice of Proposal which were the subjects of the aforesaid convictions.

At all material times Joseph Anthony DeSapio Jr. was one of the only two persons who were officers, directors, shareholders or employees of the applicant company. He was its secretary as well as one of its only two salesmen. The only other officer, director, shareholder or employee of the said company was Joseph DeSapio Sr. The evidence we have seen and heard is that Mr. DeSapio Sr. was more or less constantly in attendance at or upon the business premises of the applicant company at or during all times material to this case. The Tribunal accepts as proven that he almost certainly knew what was going on and that he was aware of the odometer alterations which were taking place. Certainly he ought as President of the applicant company to have known what was happening and it was his duty to have known.

Consequently the Tribunal finds that the manner in which the Applicant Joseph DeSapio Sr. carried out his responsibilities under the Act was entirely unsatisfactory and adequately wrongful and improper to justify the implementation of the Registrar's Proposal against him as well as against the Applicant Joseph Anthony DeSapio Jr. and the applicant company.

The Tribunal accepts all elements of the Registrar's case as proven.

The Tribunal therefore directs that the Registrar's Proposal be implemented forthwith and that the registrations of the Applicant 304274 Ontario Limited as a dealer under the Motor Vehicle Dealers Act, and of Joseph Anthony DeSapio Jr. and Joseph DeSapio Sr., respectively, as salesmen under the Act be revoked forthwith.

We can only add that the Tribunal has no sympathy with people who perpetrate this particular crime which is a fraud against the consuming public and will continue as it has in the past to view the alteration of odometers or odometer spinning with the greatest distaste.

SPIROS KATOPODIS

APPEAL FROM A DECISION OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO REGISTER THE APPLICANT
AS A MOTOR VEHICLE DEALER

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY SINGER, MEMBER
TIM HOGAN, MEMBER

COUNSEL: HOWARD S. DYMENT, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING
DATE: June 15th, 1982

REASONS FOR DECISION AND ORDER

By application dated the 14th day of August 1981 (Exhibit 4), the Applicant applied for registration as a motor vehicle dealer under the Motor Vehicle Dealers Act. By Notice of Proposal dated the 15th day of September 1981 (Exhibit 3), the Registrar proposed to refuse to grant registration to the Applicant for the following reasons:

- "1. On June 18, 1981, the Applicant was convicted of an offence under Section 312 of the Criminal Code of Canada, and he was sentenced to a suspended sentence and was placed on probation for a period of twelve (12) months.
2. The Applicant failed to disclose details of his criminal record on the application which he made for the registration under the Act.
3. The conviction and the failure to disclose affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty."

The Tribunal finds that the Applicant Spiros Katopodis pleaded guilty that he unlawfully did have in his possession stolen property, namely fourteen leather coats and one suede coat of value exceeding two hundred dollars.

In the course of the trial, though stating "This is a serious matter. Most people who are involved in a situation of this kind, expect to go to jail. All things being equal, it would not be unusual for a first offender to be jailed for a serious offence of this kind", the Judge upon a consideration of "his previously good character, and his activities on behalf of others" did not sentence him to a term of jail nor fine him but gave him a suspended sentence: "there will be a conviction. You will have a criminal record and you will be placed on suspended sentence and probation for a period of twelve months."

Question 7 of the application for Regulations reads as follows:

"Has the applicant ever been convicted under any law of any country, or state, or province thereof of an offence or are there any proceedings now pending?

If yes, give full particulars."

In reply to this question, the "No" box is marked

The Applicant's explanation for the no answer is twofold:

1. His (mistaken) belief that a suspended sentence was equivalent to 'no record' which would mean that in reply to such a query as #7 the answer 'no' could be given. He based his interpretation that there would be no record on a conversation following the trial with the investigating Sergeant in respect of replies the latter made with respect to his liquor licence.

2. His reliance on the clerk in the Ministry office who (likely with the intention of being helpful) assisted him in filling out the form within the office.

The Tribunal believes the Applicant.

The Applicant is in the restaurant business and is licensed under the Liquor Licence Act.

Question 4 of the application reads as follows:

"Is the applicant engaged, occupied or employed directly or indirectly in any other business, occupation or profession?

If yes, give full particulars."

In reply to this question, the "No" box is marked.

His explanation for the "no" answer is that it would be his intent that his wife operate the restaurant and he would engage in the motor vehicle dealership. (when registration is granted)

The Tribunal recognizes that the application form is a most important and a very serious document - the consideration of all parts of which must be such that the Applicant will be readily aware of the nature of and import of the questions and answers.

Though the form has served its purpose through the years, the Tribunal is of the belief that in the light of experience such as this, it should be reviewed to anticipate the kind of problem which has arisen under the circumstances: it being recognized that full anticipation cannot be had. The Tribunal is of the opinion that the practice (if it is such) of the Office of the Registrar assisting in the completion of the form, is one which should also be reviewed.

The opinion of the Tribunal is that the procedure should be such as to place squarely upon the Applicant the onus of understanding and replying to the form. Indeed, the importance of the application with respect to the entry into a regulated industry with a registration requirement is such that an Applicant should be able on his own (or with assistance that should be available to such a businessman) to complete the same in a way that a rationale as in the present instance should not be available to an Applicant.

The Tribunal is of the opinion that upon the evidence before it, neither the conviction, nor the questionnaire answers should be the basis for the refusal.

Prior to the hearing, the Applicant was given notice that the Registrar would also call into question the financial responsibility of the Applicant.

There is a judgment of the 18th of September 1981 by the National Bank against the Applicant in respect of which there is an Execution filed in the sum of \$7,915.72 upon a judgment of the 18th of September 1981. Nothing has been paid in respect of the indebtedness to the Bank since June 1980. The Applicant has stated that he has offered \$250.00 per month but that this is unacceptable to the Bank. The details of negotiations between the parties were not placed before the Tribunal.

There has emerged at the hearing a claim by the Workmen's Compensation Board. The Applicant has stated that the matter has been settled. However, no details were placed before the

Tribunal and the only evidence is that there is still a bill of some \$2,000 being pursued.

The Tribunal notes that technically the Applicant was not incorrect in his answer regarding judgments. Again this is a matter which may be taken under review by the Registrar.

The application answers are unclear as to the place of operation or as to the nature of its financing. Though the reply 'No' to question Number 8:

"Is there any person or corporation whose name is not disclosed above who has any financial interest in the applicant beneficially, or who otherwise exercises control or direction over the applicant?"

is again technically correct, the Applicant has testified that there will be available to him financing by an outside party if registration is granted. It may also be that others will be willing to be of material assistance to him, as well as testifying to his character, but no such evidence was placed before the Tribunal.

The Applicant has admitted that he has "lost his house", that his restaurant business is not doing well, and that he has no assets.

The Tribunal finds that upon the evidence before it that having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business.

The Tribunal notes that the Applicant was heretofore registered and engaged as a motor vehicle dealer without any recorded complaint in respect thereof. The Tribunal notes further that under the Act, Section 8:

"A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

The Tribunal is aware that such a further application for registration could be as a motor vehicle salesman or dealer. Needless to say, such an application could clearly set out the details of all those matters which are significant and which have emerged as such in the light of this hearing.

For the reasons set out herein, by virtue of the authority vested in it under the Motor Vehicle Dealers Act, Section 7, the Tribunal directs the Registrar to carry out his proposal.

DONALD NEIL MACMILLAN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMAN

TO REFUSE TO REGISTER THE APPLICANT AS A MOTOR
VEHICLE DEALER

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
F. WILLIAM DALGLISH, MEMBER

COUNSEL: DOUGLAS E. ROLLO, Q.C., representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING

DATE: July 28th, 1982

RULING

The question before the Tribunal is whether the evidence of the bare fact that criminal charges are pending against the applicant may be set before this Tribunal for its consideration or whether, indeed, the Registrar of Motor Vehicles Dealers and Salesmen should have considered the same in deciding whether or not to refuse registration to the applicant.

It has been argued that the effect of the Canadian Constitution 1982 Section 11(d) precludes this. The said section reads as follows:

Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

In the Tribunal's opinion the purpose of the Motor Vehicle Dealers Act is primarily the protection of the public and the function of the Registrar appointed under that Act is to administer the same in a manner protective of the public. In our view the public interest is paramount.

Where the question of an applicant's guilt or innocence on serious charges directly relating to his or her fitness or

unfitness for the privilege of registration in a sensitive and potentially dangerous area of activity involving the interest of a member or members of the public is sub judice and where the lively possibility of serious harm to a member or members of the public is raised by such criminal charges sub judice, the Tribunal holds that the Registrar, in the exercise of the discretion vested in him by virtue of his office, is justified in staying his decision to register or not register pending the determination of such criminal charges sub judice or to take whatever other steps or decisions may be necessarily incidental to the implementation of that principle.

The same principle also applies mutatis mutandis to this Tribunal in reviewing any decision made by the Registrar.

Consequently, the Tribunal now rules that the copies of the Informations relating to the said charges in the present case are admissible in evidence.

DONALD NEIL MACMILLAN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
F. WILLIAM DALGLISH, MEMBER

COUNSEL: DOUGLAS E. ROLLO, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING
DATE: July 27, 1982

REASONS FOR DECISION AND ORDER

This was the fourth time the Applicant had appealed to this Tribunal from a Proposal by the Registrar to restrict his registration as a Motor Vehicle Dealer or to refuse to grant him the same. In each of the previous hearings before this Tribunal the Registrar was successful in that his Proposals were wholly upheld. They have all been fairly recent being dated respectively and in consecutive order September 10, 1976, May 26, 1980, February 27, 1981 and April 19, 1982.

In his most recent Proposal to refuse to grant registration to this Applicant, which was precipitated by the latter's most recent application for registration (Exhibit 5) dated March 30, 1982, the Registrar (viz, R. Livingstone, acting as Registrar) advanced the following reasons for so doing which we find it convenient to quote verbatim before proceeding further:

REASONS FOR PROPOSING TO REFUSE REGISTRATION
UNDER THE MOTOR VEHICLE DEALERS ACT TO
DON MacMILLAN (REFERRED TO HEREIN AS THE "Applicant")

I am of the opinion that the Applicant is not entitled to registration as a dealer under the Motor Vehicle Dealers Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honest. In this regard, IT IS ALLEGED AS FOLLOWS:

1. The Applicant and companies with which he has been associated have previously been registered under the Motor Vehicle Dealers Act (formerly The Used Car

Dealers Act). He first became registered on the 19th of June 1967. His last registration terminated as of the 31st day of December, 1979.

2. The Applicant then applied for registration as a motor vehicle dealer on the 23rd of April, 1980. By Notice of Proposal dated the 26th day of May, 1980, the Registrar proposed to refuse to grant registration for the Reasons set out in the said Notice of Proposal. After a hearing, the Commercial Registration Appeal Tribunal directed the Registrar to refuse to grant registration to the Applicant for the Reasons set out in its Decision and Order dated the 24th day of September, 1980.
3. The Applicant again applied for registration as a motor vehicle dealers on the 6th of February, 1981. By Notice of Proposal dated the 27th of February, 1981, the Registrar proposed to refuse to grant registration for the Reason set out in the said Notice of Proposal. After a hearing, the Commercial Registration Appeal Tribunal directed the Registrar to refuse to grant registration to the Applicant for the Reasons set out in its Decision and Order dated the 8th of May, 1981.
4. In addition to the matters referred to in the preceding paragraphs, the Applicant was charged on the 23rd day of November, 1979 with conspiracy to defraud the public and conspiracy to impersonate one John Siggins contrary to the Criminal Code. These charges related to the sale of motor vehicles which had odometer readings that were false. The Applicant is still before the courts on these charges.
5. The Applicant has not demonstrated that at this time there is new or other evidence, or that material circumstances have changed so that he is now entitled to registration.

Prior to providing the above reasons the Notice of Proposal delivered to the Applicant recited that S. 6 of the Motor Vehicle Dealers Act (the Act) provides that subject to S. 7, the Registrar may refuse to register an Applicant where in the Registrar's opinion the Applicant is disentitled to registration under S. 5.

The relevant part of S. 5 reads as follows:

5. 1. An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

As stated at the outset of these Reasons, the last of the Registrar's Proposals respecting the unfitness of this Applicant for registration in this industry prior to the present one (all of which - prior to the present one - were successful) was the Proposal of February 27, 1981 and it was upheld (as had been each of its predecessors) by this Tribunal in a Decision released May 8th, 1981. It might be wondered why the rule of stare decisis might not have applied to protect the Tribunal from the labour of yet a further hearing (and at the substantial expense of the public) in respect of yet another application by this Applicant or why this Tribunal might not be deemed functus. The answer is that S. 8 of the Act (formerly S. 21) reads:

A further application for registration may be made upon new or other evidence where it is clear that material circumstances have changed.

In its decision of May 8th, 1981, the Tribunal held that there was no new or other evidence before it such as to establish that there had been that change in material circumstances upon which (in May 1981) an entitlement to registration, which the Tribunal found the Applicant did not have in September 1980, should be affirmed as an entitlement by the Tribunal at that time (May 8, 1981).

The Tribunal holds that the same is true today, by which we mean the date of this decision, by which we dispose of the Applicant's appeal from the Proposal of April 19, 1982. In the view of the Tribunal the words "reasonable grounds" as used in that section as well as the words "the Registrar's opinion" as used in S. 6 which incorporates S. 5 by reference go together in a proper interpretation of the law as meaning "reasonable grounds in the Registrar's opinion" for belief (and again, we hold that the belief in question is the Registrar's belief).

In the Tribunal's view the "past conduct" mentioned in S. 8 is past conduct which offers "reasonable grounds" in the Registrar's opinion "for belief by the Registrar" that the Applicant will not carry on business in accordance with law and with integrity and honesty. And where that is present, present

in the Registrar's opinion and belief, then the Applicant is not entitled to registration or renewal of registration by the Registrar.

The words "past conduct" refer to past conduct in general - not past conduct which "has not already been paid for" or past conduct which "has not been cancelled out" or past conduct which "has or ought to have been forgotten".

In December 1976 the Tribunal made an Order upon consent revoking the Applicant's registration for a term of 10 months and it has been urged that the "past conduct" which underlay that revocation was "paid for" or "cancelled out" after that period of revocation had passed. We disagree. We hold that the registration which was restored to the Application at the end of that ten month revocation was restored in accordance with the Order relating to it - in that case a Consent Order - and that it would not have been open to the Registrar to have interfered or to have attempted any interference with that Order in the absence of new grounds for dissatisfaction by him so that such restored registration would in the normal course of events have continued from year to year without further interruption provided that all formal requirements of law, including the filing of annual renewal applications, and information returns and so forth were met and provided further that no fresh evidence of misconduct reached the Registrar's attention. But should that have happened, as in the event transpired in this case, should fresh evidence of bad or questionable conduct as mentioned above have come to his notice, then we hold that all the Applicant's past conduct, past conduct tending to support a decision to deny him registration, would be included in the proper subject matter of the Registrar's grounds for his Proposal, even if this meant resurrecting misdeeds which would otherwise have remained in the limbo of things past.

Such is the true nature and meaning in our view of the term "past conduct".

The Tribunal further holds that the effect of S. 8, cited and quoted above, is to place an onus upon the Applicant, not the Respondent, to discharge. We find that there is in effect and by implication if not in the specific language of the section or elsewhere, a presumption that material circumstances have not changed unless the Applicant can demonstrate that they have, and this should be done clearly and at the outset of the application so as to avoid the waste of the Tribunal's time and facilities through frivolous and vexatious applications.

One of the Registrar's reasons for refusing to register the

Applicant was that set out at paragraph 4 of the said reasons, namely the fact that the Applicant was presently before the criminal courts on charges on conspiring to defraud the public in respect to the alleged crime of altering the odometers of certain vehicles, a charge which if proven would have a direct bearing upon his suitability as a motor vehicle dealer or salesman.

We cannot believe that the Registrar intended to cite this pending charge in respect of which there has been neither conviction nor acquittal as evidence of "past conduct". We are inclined to infer that the fact of the pending charges served merely to trigger his recollection of other unsatisfactory "past conduct" at his properly exercised discretion.

We do not judge whether the fourth item on the list of reasons was correctly included or not - this would depend on how we were to interpret it but we do hold that it was redundant to the Registrar's purposes and that the first three reasons given are sufficient to fully justify his proposal which the Tribunal now upholds. Consequently, the Tribunal now Orders the respondent Registrar to implement his Proposal forthwith and to continue to refuse registration to the Applicant.

By way of passing comment or obiter dicta the Tribunal will now address itself briefly to the Applicant's argument in respect to the provisions of S. 11(d) of the Bill of Rights and Freedoms set forth in the Canadian Constitution Act of 1982 and which reads as follows:

Any person charged with an offence has the right to be presumed innocent until proven guilty according to law and in a fair and public hearing by an independent and impartial Tribunal.

The Commercial Registration Appeal Tribunal does not make findings of guilt or innocence in respect of criminal matters or otherwise. It does not prejudge cases pending in the courts of competent jurisdiction thereto relating. Its function is the protection of the consuming public and we think that members of the public at large are entitled to rights and freedoms just as much as any one else.

To be charged with a crime is not a privilege which endows anyone with some special right to become exempted from the operation of common sense or the kind of ordinary thinking which any decently responsible person would employ in making decisions, temporary or permanent, to ensure the protection of persons towards whom he or she felt a protective responsibility.

Nor is the "presumption of innocence" long enshrined in the common law of England and part of our inheritance as citizens of Ontario something new, novel, and suddenly bestowed upon us by the new federal enactment referred to howsoever it may be perceived by any elements of the public.

Persons such as the present Applicant will continue to be presumed "innocent until proven guilty" not only when they come before this Tribunal but elsewhere just as they always have been. But persons denied registration by the proper application of S. 5(1)(b) of the Motor Vehicle Dealers Act will continue to be denied registration in that industry until, by operation of S. 8, also cited, they have proven that material circumstances have changed. The onus of such proof as stated above will continue and we do not see how the new Canadian Bill of Rights and Freedoms can operate to change that.

The Tribunal would also mention, in passing, that during the course of the hearing certain words were heard which tended, perhaps, to suggest the possibility that the Applicant, who of course is without registration either as a dealer or a salesman under this Act, may possibly be carrying on business either as a dealer or as a salesman de facto but not de jure by virtue of the fact that his wife has recently received registration as a motor vehicle dealer and that he has been in somewhat frequent attendance at the premises where the business of this new dealership is being carried on. In his evidence he stated that his function there was that of a car washer. He also said that the Registrar is carrying on a "vendetta" against him and is sending "spies" to "harass his wife". The Tribunal expects its decisions to be implemented and, if necessary, enforced by the proper agencies. Any monitoring of the new dealership either by the police or the Registrar considered necessary to ensure that the law is obeyed will be entirely in order.

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under the Motor Vehicle Dealers Act, Section 7

The Tribunal Orders that the Registrar's Proposal to Refuse to Register the Applicant be upheld subject to the written reasons

VENIZELOS SKOUROS

APPEAL FROM THE PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
J. T. HOGAN, MEMBER

COUNSEL: VENIZELOS SKOUROS, appearing in person
PETER J. WILEY, representing the Respondent

HEARING
DATE: December 7. 1982

REASONS FOR DECISION AND ORDER

The Applicant Venizelos Skouros has not made a favourable impression on the Tribunal. Whether or not the authors of the two letters submitted by way of character references were aware of the nature of the registration sought, we know not. We feel that the application form which was submitted contained a misleading omission of very serious and material information regarding one or more past convictions and the Tribunal is very displeased that the applicant's brother, whom we feel almost certainly knew of these, would have signed it. The brother is not present this morning but the Tribunal's decision inter alia will serve as a message to him.

Mr. Skouros the applicant is 19 years old. He is a glib young man who strikes us as eminently street-wise. We feel he should have an opportunity to develop more respect for the system by which members of our mutually interdependent and law abiding community should live and work together than he has demonstrated by his remarks today. We feel he should not be registered at this time and should not apply for registration again for at least one or two years.

The Tribunal directs the Registrar of Motor Vehicle Dealers and Salesmen to implement his Proposal and not register the applicant as a Motor Vehicle Salesman.

GEORGE J. SMITH

APPEAL FROM THE PROPOSAL OF THE REGISTRAR OF MOTOR
VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
PAUL WILLISON, MEMBER

COUNSEL: BRADFORD J. KELNECK, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING

DATE: July 12th, 1982

REASONS FOR DECISION AND ORDER

The Applicant has appealed to this Tribunal from the proposal of the Registrar of Motor Vehicle Dealers and Salesmen to refuse him registration as a motor vehicle salesman under the Motor Vehicle Dealers Act 1970 c.475 as amended on the grounds that the said Registrar was of the opinion that the past conduct of the Applicant "affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty" as provided at Section 5 (1)(b) of the said Act. The particulars set out in the Registrar's Notice of Proposal are as follows:

1. It has been alleged that on or about the period of January 1978 to September 1980 Smith defrauded West York Chevrolet Oldsmobile Inc. of property, money or valuable security of a value exceeding \$200.00.
2. It has been further alleged that during the period of January 1979 to September 1980 Smith did steal \$243,570.82 in money, more or less, the property of West York Chevrolet Oldsmobile Inc.
3. Smith has been charged with offenses under the Criminal Code in respect of the allegations set out in items 1 and 2 above and is presently awaiting trial on these charges.

As an addendum to these particulars counsel for the Registrar advised the Tribunal at the commencement of the hearing that the Applicant had been convicted on September 9th, 1981 of having defrauded the said West York Chevrolet Oldsmobile Inc. of property, money or other valuable security of a value exceeding \$200.00 contrary to the Criminal Code Section 338 (1). The other charge against him was not proceeded with and this conviction was entered upon a plea of guilty.

The Tribunal has heard testimony from the Registrar of Motor Vehicle Dealers and Salesmen, Mr. Alan Abrams, who gave evidence in support of his proposal as well as from Mr. Ross Wemp, the president of Ross Wemp Motors Limited and from the Applicant Mr. Smith. The evidence disclosed that a very large sum of money was stolen over a lengthy period of time and this crime was facilitated by the close relationship between Mr. Smith and his employer Mr. Seedhouse, the president of West York Chevrolet Oldsmobile Inc., who was also his friend, as well as by the unsuspecting trust of his customers, members of the public. He took advantage of the trust of his employer as well as that of members of the public. The scheme to steal was sophisticated, well thought out and methodically implemented over a long period of time. It involved false documents, the execution of which was fraudulently procured, and which were then fraudulently utilized to put the Applicant in funds which he used to gamble. There has been no restitution of the money lost by the employer or the insurance company which had bonded the Applicant.

However, endorsed upon the face of the Applicant's most recent application for registration which is marked as having been received by the Registrar March 24th, 1982 is the certificate of Ross Wemp Motors Limited executed by Ross Wemp as president and reading as follows:

CERTIFICATE OF EMPLOYER

I, Ross Wemp Motors Ltd., hereby certify that the information given by the applicant is to the best of my knowledge and belief true, and request that the application be granted. I further certify that I will not employ the applicant as a registrant until I receive his certificate of registration.

Mr. Wemp in his testimony stated that he would be happy to employ Mr. Smith notwithstanding the criminal conviction and would take full responsibility for so doing. The Tribunal finds it surprising that Mr. Wemp would wish to assume the responsibility of doing this thereby risking, inter alia, the high and admirable reputation enjoyed by his business in the community, but this is what he is proposing to do and the Tribunal cannot fail to be impressed by this.

Mr. Wemp is a business man of exceedingly high repute and we have no doubt that he is an efficient, sound business man and that he will be able to exercise strong and direct control over Smith if the latter is permitted to go to work for him. Mr. Wemp's support of Smith and his willingness as a man of substance, integrity and proven competence in the industry, to accept the responsibility of employing him, at his own and his company's risk, is critical to the Tribunal's decision.

The Tribunal has also taken into account that the Applicant, apart from his compulsive addiction to gambling, which we are assured is now under control, has led a sober, responsible, steady and otherwise useful life. He was steadily engaged by West York Chevrolet Oldsmobile for upwards of nineteen years. During this time, except for the lapse of which we have heard, his performance was entirely satisfactory. He has been married and residing in the same house for almost 25 years. Two of his three sons are university graduates and the youngest is living at home and attending school. We feel that if Mr. Smith is to repay all or any of the funds which he has misappropriated he should be productive and in receipt of an earned income which, on the basis of past earnings, should be in the area of \$30,000.00 a year or more. Given the quite unique prospect of strict supervision on an ongoing basis by Mr. Ross Wemp, we feel that the latter's offer to employ him ought not to be disregarded.

We have also taken into account the fact that the crime of which Smith was convicted, distasteful and abominable as it undoubtedly was, did not involve acts of monetary fraud against members of the public directly. The Tribunal's function is to safeguard the public, not to punish. Punishment is the function of the court of criminal jurisdiction and that function has been performed. Given the circumstances as described, we feel that the public interest need not be compromised by our allowing Conditional Registration to the Applicant as a motor vehicle salesman, work in which he is experienced and competent, provided the Registrar shall maintain a vigorous degree of surveillance and provided further that the following two conditions are met: namely, that the Applicant shall not

default or fail in the terms of his probation presently in force respecting the criminal conviction registered against him and provided further that such Conditional Registration, which the Tribunal hereby Directs the Registrar to grant him, shall apply for the period of five years next following only so long as he is employed by Ross Wemp Motors Limited and not be transferrable.

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under the Motor Vehicle Dealers Act, Section 7,

The Tribunal directs that the registration of the Applicant be allowed upon the terms set forth in The Reasons for Decision. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

IN THE MATTER OF THE MOTOR VEHICLE DEALERS ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 299

AND IN THE MATTER OF an appeal pending in the
Supreme Court of Ontario (Divisional Court) from a
Decision and Order of the Commercial Registration
Appeal Tribunal released June 25th, 1981

BETWEEN:

JAMES STEPHENSON

Applicant

AND

THE REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

O R D E R

Upon application made on behalf of James Stephenson on this 15th day of February, 1982, for an Order pursuant to section 7(9) of the Motor Vehicle Dealers Act, R.S.O. 1980, c. 299, as amended, granting a Stay of the Decision and Order of the Commercial Registration Appeal Tribunal released June 25th, 1981, pending the disposition of an appeal from that Decision and Order to the Supreme Court of Ontario (Divisional Court), or for such other Order as may seem just.

Upon due consideration of the proceedings herein, the Decision and Order of the Commercial Registration Appeal Tribunal released June 25th, 1981, the Notice of Appeal of the Applicant to the Supreme Court of Ontario (Divisional Court) and upon hearing counsel for the Applicant and the Respondent as well as such additional evidence as was this day adduced,

The Tribunal denies this application.

TERRANCE T. WEBSTER

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATION

TRIBUNAL: JOHN YAREMKO Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
TIM HOGAN, MEMBER

COUNSEL: TERRANCE T. WEBSTER, appearing in person
PETER J. WILEY, representing the Respondent

HEARING
DATE: June 30th, 1982

REASONS FOR DECISION AND ORDER

The Applicant Terry (Terrance) Webster was previously registered as a motor vehicle salesman for periods, which included those set out in Exhibit 6: from April 1977 to the 31st of December 1980 when the registration terminated. No renewal was applied for at that time.

By application (Exhibit #5) dated the 29th of June 1981, the Applicant applied for registration as a motor vehicle salesman and the Registrar on the 10th day of December 1981 issued a Notice of Proposal to refuse the registration. The Applicant has required a hearing by the Tribunal.

To the question in the application "Have you ever been convicted under any law of any country, or state, or province thereof, of an offence, or are there any proceedings now pending?", the block noted "yes" is ticked. To the further part of the question "If yes, give full particulars:" there is written in "Impaired (sic) Driving, 1977".

There has been filed before the Tribunal, Exhibit #7, which are five Certificates of Conviction of offences which, although of a variety in nature, were related (as the Applicant testified) to the consumption of alcohol. The answer, accordingly was a false one. It is to be noted that the signature of the Applicant appears above the warning (so designated in bold print) "It is an offence to knowingly provide false information on this application."

The Applicant has explained his answer by stating he did not wish his wife nor his employer to know of the convictions. The Tribunal notes that the employer has signed the Certificate which forms part of an application which is not correct. It is that application which has to be considered by the Registrar and by the Tribunal. To amend the application by an addition of the necessary facts relating to the convictions to make the application correct in such a way is to affect a significant third party to the application, namely the employer, and is not a course of action this Tribunal will follow.

The Tribunal notes for the Applicant, Section 8 of the Motor Vehicle Dealers Act which reads as follows:

"A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

Needless to say such a further application would have to be meticulously correct and supported by such evidence as indeed would be new or other, or as the Section reads "...where it is clear that material circumstances have changed."

Upon the evidence before it at this hearing, the Tribunal finds that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

By virtue of the authority vested in it under the Motor Vehicle Dealers Act, Section 7, the Tribunal directs the Registrar to carry out this proposal.

SHEIKH NISAR AHMAD

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
LOUIS RICE, MEMBER

COUNSEL: SHEIKH NISAR AHMAD, appearing in person
PATRICIA HENNESSY, representing the Respondent

HEARING
DATE: November 17th, 1982

REASONS FOR DECISION AND ORDER

The Tribunal has now reached a decision, a decision which will not surprise anybody present in this room. It is a decision which we have been unable to avoid on the basis of the submissions we have heard and on the basis of the law as we understand it to be, and again on the basis of previous decisions made by this Tribunal by which we are bound by virtue of the rule stare decisis which, as you know, means "stand decided".

Ignorance of the law is completely irrelevant in our system, although it seems to the Tribunal that quite a few people are bringing appeals to this Tribunal with considerable inconvenience to themselves and expense to the taxpayers of Ontario on the basis of misapprehensions as to what their rights are under the Ontario New Home Warranties Plan Act and this is a pity.

The claimant today, Mr. Ahmad, during the course of his testimony and submissions indicated he was under the impression that the warranty which is provided by the statute covered all manner of defects. Of course this is not the case. When you buy a motor car it is sometimes subject to a warranty and frequently there will be a very high warranty for a certain number of months and then for an extended period there will be a further warranty but the extended warranty in most instances is for very serious problems only. In this statute the term

'major structural defect' is used and not everyone knows just what the Legislature had in mind when they coined that phrase.

The applicants failed to prove that deficient workmanship here had produced a failure in any loadbearing portion of the home. In this case there has been no allegation of deficient workmanship. Moreover it was not proven that the purpose for which the building was intended, that is to say residential occupancy in the normal course has been adversely affected.

What we have in the case before us this morning is a situation where there are hairline cracks. In the observation of the Tribunal hairline cracks in basement walls which develop in three or four years after a house is completed are not exceptional. They are not unusual. They occur very frequently and the repair of such problems falls under the heading of ordinary maintenance.

There is no such thing as a building in which there will not be problems from time to time, but these are maintenance problems. A homeowner must be prepared to deal with these. At all events, the Legislature of Ontario cannot have intended for the Ontario New Home Warranties Plan Act to cover problems of this sort and the Tribunal does not hold that they are covered. Consequently, although we are very sympathetic with Mr. Ahmad and we appreciate the courteous and articulate way in which he presented his case the Tribunal is unable to assist him and the claim must therefore fail.

MR. & MRS. S. J. BRENZEL

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D. MacFARLANE, MEMBER

COUNSEL: S. J. BRENZEL, appearing in person
BRIAN CAMPBELL, representing the Respondent

HEARING
DATE: October 18, 1982

RULING

The Tribunal has considered the matter before it, whether or not the discretion given to it by the terms of the Ministry of Consumer and Commercial Relations Act should be exercised on the grounds that there exist reasonable grounds for applying for an extension of the time in which the Applicants are meant to give notice of intention to appeal. The Legislature must have contemplated that there would be times when this Tribunal would make such a finding or find it possible to make such a finding, otherwise this discretion would not have been given.

The countervailing consideration, of course, is that time limits which are incorporated in this and other statutes should not be lightly set aside. In general principle it is the view of the Tribunal that time limits should be strictly adhered to. But in this particular case the Applicants have at least created a certain amount of controversy or demonstrated grounds for consideration that there may have been a letter sent and whether or not it reached the Ontario New Home Warranty Program or the Tribunal, or why it did not if it did not, the Tribunal does not know.

At all events a sufficient question has been raised that the Tribunal feels it ought to exercise its discretion and to hear this case and orders accordingly.

BRENDA AND WILLIAM CATALANO

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
ALBERT LONGO, MEMBER

COUNSEL: BRENDA AND WILLIAM CATALANO, appearing in person
BRIAN CAMPBELL, representing the Respondent

DECISION: July 30th, 1982

REASONS FOR DECISION AND ORDER

At the outset the Tribunal would like to say what a pleasure it has been to have heard a case presented with the natural skill and verve which has been displayed by Mrs. Catalano.

Next we wish to say, and not for the first time, how very much the Tribunal regrets the manner in which the warranty provided by the Ontario New Home Warranties Plan Act is frequently set before the public not only by real estate agents but by the propagandists who prepare the Program's literature. For example we would cite a brochure issued under the authority of the New Home Warranties Plan in which the following words appear on the cover:

"5 YEAR WARRANTY on all new homes in Ontario"

The numeral 5 is in extremely large print and is followed by the words "YEAR WARRANTY" so as to read "5 YEAR WARRANTY". It's an enormous presentation and it's set against a background of a yellow or golden seal which appears to be a representation of the kind of seal you would see on a diploma or a certificate of honour of some sort. This is promotional material which in our view comes close to being exaggerating and misleading, scarcely in keeping with the spirit and purpose of a program which was intended to provide protection to consumers. It seems almost tailored to the purposes of unethical realtors bent on exaggerating the extent of the coverage given.

In the instant case we find that Mr. & Mrs. Catalano have a small home of the type called a link detached home, built by

the Coventry Construction Company which apparently is now either insolvent or in a state of mismanagement and arrears in its obligations such as to appear an unlikely source of redress to the purchasers of its housing products.

This home, which was first occupied by the claimants on November 18th, 1980 has one bathroom only. We are told that the tiles on the bathroom floor and walls have either fallen away or have, of necessity, been removed because of decay, rot and mildew occasioned by water penetration. We find that this water penetration is the result of a number of factors including poor workmanship and material resulting in abnormal shrinkage of the grout between the tiles and by inadequate capping of the tiles and inadequate water proofing of the wallboard - all in the vicinity of the shower and bath area with the result that when the shower was utilized by the occupants such water penetration was the inevitable result. The walls are now open to the studs. The claimants have been unable to bathe in any degree of comfort and have been grossly hampered in the way in which they are able to bathe their infant children and they have been unable to shower at all. A letter from the local Health Office states this situation, upon inspection, was found to be unsafe for the children.

The problem was not communicated to the warranty program in writing within the one year period as required. But there is evidence supported by a telephone bill that the claimants called the HUDAC office in Toronto on the last day of the one year warranty. There is verbal testimony, which we are inclined to accept, that Mrs. Catalano, during that telephone conversation with a Warranty Program official upon that date, (which was so very critical to her interest) was mollified with words and told not to worry and that her claim would be registered. The proper advice, such as a person in her position was entitled to have received from the Program's spokespersons, on the very last day on which she was entitled to make a claim within the one year warranty period, would have been advice to deliver written notice upon that very day or to have sent a telegram or telex immediately. It seems that the Program's spokesperson gave the claimant improper advice, which was to her detriment but to the benefit of the Warranty Program or its compensation fund, and we find this to have probably been the case by reason of the evidence we have heard. We again find this regrettable, and a circumstance which would entitle the applicant to any equitable consideration available to a forum considering this case.

In this particular case where there is only one bathroom in the home and where the use of the one and only bathroom is so severely curtailed we are inclined to say that a major structural defect may well exist within the partial definition laid down by the Tribunal in a recent decision in the case of Mr. & Mrs. Wayne Kennedy where the following language was used:

A major structural defect in our view, and as we have found in the past, must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse.

We refer specifically to the words "unsafe", "uncomfortable beyond reason". Mr. Campbell has argued that a finding in favour on the claimants is precluded by the exception set out following the second sub paragraph of paragraph (m) of Section 1 of Part 1 of Bylaw R1 in the Regulations to the Act which reads as follows:

Major structural defect means for the purposes of Clause (b) of subsection 1 of Section 13 of the Act, and any defect in workmanship or materials that materially and adversely affects the use of such building for the purpose for which it was intended but excluding dampness not arising from the failure of a load bearing portion of the building.

We find that the problem in this case is not "dampness", per se, but damage resulting from a defect in workmanship and materials that materially and adversely affects the use of the building for the purpose for which it was intended which results from "water penetration". In our view all "water penetration" includes "dampness" but not all dampness per se consists of water penetration.

Accordingly, the Tribunal allows this claim and Directs the respondent to take, at the expense of the guarantee fund, such steps as may be necessary to rectify the subject thereof forthwith.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

THE ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 350

IN THE MATTER OF the REGISTRATION of
COVENTRY-GRAYSTONE PROPERTIES LIMITED
as builder

AND IN THE MATTER OF the PROPOSAL of
the Registrar under the Ontario New Home Warranties Plan Act
made pursuant to Section 9 (1) of the Ontario New Home
Warranties Plan Act
TO REVOKE THE REGISTRATION.
-Proposal dated: the 7th day of June, 1982

AND IN THE MATTER OF a request pursuant to Section 10 (7) of the
Ministry of Consumer and Commercial Relations Act for an
extension of the time for giving notice of a requirement for
a hearing respecting the said Proposal pursuant to Section 9
(2) of the Ontario New Home Warranties Plan Act.
-Request dated: the 30th day of July, 1982, by

COVENTRY-GRAYSTONE PROPERTIES LIMITED

Applicant

and

THE REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Matthew Sheard, Vice-Chairman
D. H. MacFarlane, Member

Upon the matter coming before the Commercial Registration
Appeal Tribunal on the 28th day of October, 1982 in the
presence of:

Jonathan H. Fine, representing the Applicant

Brian M. Campbell, representing the Respondent

REASONS FOR RULING

The Tribunal's discretion to extend time is to be based on its being satisfied as to two conditions set out in Section 10(7):

"Notwithstanding any limitation of time for the giving of any notice requiring a hearing by the Tribunal fixed by or under any Act, and where it is satisfied that (and I insert 'firstly') there are prima facie grounds for granting relief and (I insert 'secondly') that there are reasonable grounds for applying for the extension the Tribunal may extend the time for giving the notice either before or after expiration of the time so limited, and may give such directions as it considers proper consequent upon such extension."

With respect to the prima facie grounds, the decision to issue the Notice of Proposal was based on the fact that one of two guarantors required to establish financial responsibility upon the granting of the initial registration was placed in receivership.

No consideration was given to the question of whether the current situation of the other guarantor is sufficient in itself, nor to the evaluating of any proposal by the applicant with respect to financial responsibility being determined in other form.

The Tribunal accordingly finds that there are prima facie grounds for granting relief.

With respect to the reasonableness of the application, the Tribunal finds that the Notice was, in fact, received by the applicant but the Notice was not given in such a fashion as to enable interested parties thereof to take the necessary action. Where a form such as the Application for Renewal invites the designation of a person (the name, address and title of the officer or employee of the Applicant) to whom correspondence relating to the plan should be directed and where particularly the person designated is, in fact, an officer, specifically secretary of the corporation (Applicant), it is reasonable to expect that notice to be given would be given to the person so designated.

Accordingly BY VIRTUE OF THE AUTHORITY VESTED IN IT UNDER Section 10(7) of the Ministry of Consumer and Commercial Relations Act, the Tribunal hereby extends the time for giving notice to the 15th of November, 1982. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) and subsequently the appeal was abandoned.

DR. LOUIS FIELDS

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
MARTIN SHAKESPEARE, MEMBER

COUNSEL: RAYMOND RAPHAEL, representing the Applicant
BRIAN CAMPBELL, representing the Respondent

HEARING

DATE: October 21, 1982

REASONS FOR DECISION AND ORDER

The Tribunal's decision in this case is unanimous, and is unanimous not only as to the conclusion reached upon unavoidable reasons, but also as to the regret felt by the Tribunal in coming to it.

Dr. and Mrs. Fields took possession of their home in June 1979. During the first year several items were the subjects of complaints properly brought within the initial or one-year warranty period referred to in the Statute but not the roof problem which has been the subject of this hearing. The Tribunal finds that the problem on the roof was not, in fact, communicated to the Warranty Program within the first year.

In the summer of 1982 Dr. Fields ordered a very substantial roof renovation which was duly completed on or about August 17th, 1982. The Tribunal has absolutely no doubt that when he did this Dr. Fields was certain in his own mind that this work was essential in order to avoid what he then perceived as a very terrible risk to the safety of his family, the occupants of the house, consisting of the presence of several tons of water on the roof which he felt imminently threatened to descend upon them and otherwise enter the home rendering it unfit for habitation and possibly and probably causing great

damage to the building and its contents at the same time. Dr. Fields ordered this work while under the understandable if mistaken impression that this was the case, an impression based on his own observations as well as his interpretation of what he had been told by others. It was also his apparent belief that prompt action was essential in these perceived circumstances and that delay could produce most dire consequences and could therefore not be justified, the kind of delay which would inevitably be entailed through further dealings with the Warranty Program or through having one or more reports made by competent experts such as an architect or a consulting engineer or an impartial and experienced builder. He consulted several roofing contractors the last of whom, having confirmed through his assessment of the situation the view held by the doctor, was given the job and duly completed it in two days of concentrated work at a price of \$5,600.00. The new roof is less heat-insulative than the former one, is guaranteed for five years and eliminates the former problem. The Fields are happy with it. They also feel that they have a claim for indemnification from the Compensation Fund established under the Act for the cost of it, some \$5,600.00, on the grounds that the problem which existed prior to the installation of this new roof and which the new roof cures was a "Major Structural Defect" as defined and the subject of the extended or five year warranty provided by the Act and its Regulations.

The Regulations provide that:

"major structural defect" means ...any defect in workmanship or materials

- (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants,

licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage

The problem prior to the installation of the new roof was described to the Tribunal through words, photographs and diagrams. It seems that the building plans or specifications which had evidently been drawn by an architect and filed by the builder of the house with the municipal authorities were either silent as to certain particulars - presumably bestowing upon the builder a procedural discretion - or else had been disregarded. If a builder or "workman" strictly follows the specifications of an engineer or architect any "defect" arising from this cannot be called a defect in "workmanship" - it would be a defect arising from the efforts of the professional, called a "design defect" and generally be outside of the scope of the warranty. The Tribunal finds that this is not the case here and that whatever were the defects of the roof in question prior to its replacement, whether "major" or "minor", they were defects in "workmanship".

It seems that the unreconstructed roof which existed prior to the work which was done - which gave rise to the perceived problem(s), consisted of plywood sheets laid over roof beams (between which no insulation had nor yet has been applied) and on top of which was tar paper and tar surmounted by slabs or pads of styrofoam about 4 inches thick and two feet square or so upon which chunks of gravel had been laid. Unfortunately, these slabs or pads of styrofoam - occasionally called "tiles" - were evidently lighter than water and over the years they were displaced by water - rain and melting snow - so that much of the gravel moved from above to below them and they floated about atop the roof grotesquely, presenting a slatternly aspect revolting to the eye, seemingly to epitomize the word "defective" especially when applied to "workmanship". And the displacement of the pads did affect their function. But their function was to insulate against heat loss. It had nothing to do with preventing the entry of liquids.

The scuppers and drains had been so located that for this and possibly other reasons a large volume of water had accumulated upon the surface of the roof - particularly towards the central area of it and this is what had caused the unsightly displacement of the pads and gravel, a situation known as "ponding".

Sometime in the mid-summer of 1982 Dr. Fields observed certain evidence of moisture, water-penetration from above, in his daughter's bedroom. It was this that led him to mount up to the roof - as the Tribunal understands it for the first time since 1979 - where, as indicated by the description of the roof furnished in the foregoing lines, he beheld a scene of utmost intimidation.

The Tribunal's task has been in essence to determine whether Dr. Fields' fear when he contemplated this view of his roof, upon which allegedly tons of water lay ponding amidst the crazily and alarmingly displaced pads, a fear felt not just for the safety of his home and contents but for that of his family, was justified.

His task at the Hearing was to prove it.

The Tribunal, as indicated, feel every sympathy for the thoughts and considerations which impelled him to proceed without delay to the reconstruction of the roof. Members of the panel - possibly excepting the one who is himself an experienced builder - might have done the same. It seemed to him that the perceived risks were sufficiently serious to outweigh the wisdom of substantiating, at that time, the existence of those elements of structural damage or infirmity essential to prove the existence of a "major structural defect". Who could blame him? Who would fuss over details at a time when he actually believed what the Applicant evidently did believe? Who would subordinate the safety of his family and home to the requisites of a future quibble?

Consequently the two expert witnesses who were later called to the stand to prove to the satisfaction of the Tribunal that the defects in question and the work done to remedy them were the proper subject of a Ruling by the Tribunal allowing compensation out of the Compensation Fund (not only to compensate for that work, but by implication of law, to pay as well for the cost of identical work in identical circumstances elsewhere) were the roofing contractor who had recommended, performed and profited from the job, and an architect who had only viewed the scene ex post facto.

To put it shortly, the Tribunal is not convinced either by the Applicant's evidence or argument that the work done was essential to cure a "major structural defect" as it was incumbent upon the Applicant to do.

The Tribunal accepts that there was a defect in the roof. The Warranty Program admitted this and would have fixed it, they have stated, had it been the subject of a written complaint within the one year period - which the Tribunal holds it was not. But whether it was a "major" as well as a "structural" one the Tribunal knows not. The evidence ought to have been strong, certain, unequivocal, and authoritative. The evidence presented in support of the claim did not discharge that onus. The Tribunal is sorry. The Applicants had our sympathy throughout the Hearing. But that alone was not, of course, sufficient to permit the Tribunal to fulfill its function in their favour.

The Applicants failed to prove that the deficient workmanship here had produced a failure in any load-bearing portion of the home or any "adverse affect" or deficiency in the "function" of the same. For example, the Tribunal was not convinced by any testimony or other evidence put before it that the roof was in imminent danger of collapse.

Moreover, it was not proven that the purpose for which the building was intended, patently residential occupancy in the normal course, had been adversely affected or impaired. The Applicants apprehended or dreaded an immediate structural disaster or an inundation but no witness was brought to prove their fears well-founded. They may have been. It was not proven. The evidence was that there was no major opening in or penetration of the tar and tar paper membrane which had been applied to the plywood roof, although the moving gravel might have abraded or excoriated it permitting minute penetration of water. Alternatively, the drops referred to in the child's bedroom could have been the result of condensation. Nor was distortion of joints or roof structure present; or if it was it was not proven.

The use of the word "major" in the all-important phrase "major structural defect", which was devised by the Legislature in its wisdom when it framed this Statute, was almost certainly deliberate. Without it we are left with two words only viz. "structural defect" and the warranty would apply to anything qualifying for that bare definition. But it doesn't, because the Legislature has used the word "major". The defect must therefore be "major" to be warranted. In this case that has not been proven, although the onus is very clearly upon a claimant to do so in order to succeed.

For the reasons stated the present Application has failed to succeed and the Tribunal is obliged therefore to Order that it be and the same is accordingly Dismissed.

In passing the Tribunal notes that the use of the word "major" implies the fact that there exists an antonym to that word or complementary opposite which is the word "minor". That is to say, the concept of a "major structural defect" implies the complementary concept of a "minor structural defect". The Legislature must have had both such kinds of deficiencies in contemplation - one warranted and one not warranted.

GARY W. FORMA

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD, VICE-CHAIRMAN
JOHN HURLBURT, MEMBER

COUNSEL: ED PHILIP, Agent, acting on behalf of the Applicant
PATRICIA HENNESSY, representing the Respondent

HEARING

DATE: October 15, 1982

REASONS FOR DECISION AND ORDER

The applicant took possession of the new home herein on the 30th day of June 1978. The purchase was with an unfinished basement.

Following a thaw in January 1981 water began to seep in through a crack in the west wall and the applicant brought it to the attention of the Program.

On the 10th day of September 1981 the applicant formalized a claim on the basis of a Major Structural Defect in respect of a problem described as "Leak in basement wall".

The Tribunal finds that early in 1981 there developed a hairline crack in the west wall, at the base. On occasion of thaw or rain or watering of the lawn, water seeped through the crack, across the slope of the basement floor some 20 feet to drain. This was verified by a Program inspector on the 10th of September 1981 when he applied a 'hose test'. The condition persists.

Between September 1981 and September 7th, 1982, when the Program inspector again visited the basement, the crack had deteriorated somewhat, and the water was still seeping in. During the interval, the applicant had placed a carpet through the course of the flow across the basement floor which soaked up the water, remaining continually wet (squishy). A fungus

growth (akin to mildew) had appeared on the basement wall at the crack. The air in the basement had become musty.

Since the claim was made beyond one year, in order to succeed the applicant must demonstrate that his claim is based upon the existence of a Major Structural Defect as defined in Regulation 726 R.R.O. 1980, Section 1, Paragraph (o) namely:

"major structural defect" means, for the purposes of clause 13 (1) (b) of the Act, any defect in workmanship or materials,

- (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage;
(underlining Tribunal's)

Upon the evidence before it, the Tribunal finds:

- a) There has been no failure of any load-bearing portion of the building nor has its load-bearing function been materially and adversely affected. Indeed though submitted as a basis of the claim no direct evidence in this regard was placed before the Tribunal.
- b) The crack does not come within the above inclusion 'major cracks in basement walls'. The crack is hairline. The fact that water seeps through to the degree described does not indicate a "major crack".
- c) The dampness (and in this instance the water presence is of a degree that it can so be described) comes within the above exclusion for it is not that arising from a failure of a load-bearing portion of the building. Such a failure has not been found by the Tribunal above.

- d) The Tribunal finds that the seepage of water through the crack is not such as to materially and adversely affect the use of the home for the purpose for which it was intended. The basement has been used and continues to be used for the placement of furniture. Such furniture was in fact utilized after possession of the house was taken; the maintenance referred to later could have enabled a reasonable continuation of that utilization.

If there were a desire to have a use akin to that of a finished basement, action such as, for example, the use of epoxy to prevent the seepage would have been a part of the process reasonably the obligation of the owner.

The above findings would exclude the complaint from being that related to a Major Structural Defect and the Tribunal has so found in respect of similar complaints dealt with in hearings:

Re: Kaloni	8 C.R.A.T.	42
Re: Scime	8 C.R.A.T.	73

A distinction submitted in this case was that the use was materially and adversely affected by reason of an odour which was alleged to be related to the seepage of water as a result of the crack. Description of the intensity of the odour ranged in strength from being non-existent to the inspector, through varying degrees described by neighbours and the applicant to the point of not being bearable after 45 minutes.

Such odour, in the opinion of the Tribunal is a matter of subjective judgment. The Tribunal finds that the neighbours had become 'conditioned' to the presence of odours prior to entry; the applicant was responding strongly to a situation which was a source of general aggravation to him.

The Tribunal is of the opinion that the odour, if any, is not such as to materially and adversely affect the use of the building.

In any event the Tribunal finds that the odour described as musty, though related to the presence of water is such that reasonable maintenance by the applicant would have prevented it. As was pointed out there was available to the applicant, the simple remedy of removal of the rug, the continuing presence of which would aggravate the situation and replacement with disposable newspaper sheets, and the resort, as is so common under the circumstances of a wet basement to a dehumidifier. Cleaning would likely have ameliorated the situation greatly.

The applicant assumed an adamant position throughout the whole period and took no direct action in respect of the problem

The position was maintained despite the recommendation (9d) of the Program "that the subject area be properly maintained in order to prevent any further deterioration which may occur".

The applicant had a strong conviction that he should do nothing; the responsibility was that of the Program. It appears that there was a misapprehension from the outset on his part as to responsibility and extent: "... builder is responsible for the first year. Hudac is responsible from the second to fifth years".

The Tribunal finds that the condition of the basement wall, and within the basement is not that of a Major Structural Defect, nor because of such.

Accordingly, BY VIRTUE OF THE AUTHORITY vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs HUDAC New Home Warranty Program to disallow the claim.

C. GAVARIS

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, Vice-Chairman as Chairman
WATSON W. EVANS, Member
JOHN HURLBURT, Member

COUNSEL: C. GAVARIS, appearing in person
PATRICIA HENNESSY, representing the Respondent

HEARING

DATE: February 24th, 1982

REASONS FOR DECISION AND ORDER

This was a claim in which the existence was alleged of a major structural defect as defined by the Act and its Regulations.

Certain cracks were noticed during the fourth year of the age of the house, which was the fourth year of the warranty period.

However, the Claimant failed to establish that these cracks in any way satisfied the criteria heretofore laid down as constituting a major structural defect. The claim was accordingly dismissed.

FLORENCE GOUGH

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY SINGER, MEMBER
JOHN HURLBURT, MEMBER

COUNSEL: F. M. MAROTTA, representing the Applicant
BRIAN CAMPBELL, representing the Respondent

HEARING
DATE: June 9, 1982.

REASONS FOR DECISION AND ORDER

This has been a hearing to consider a claim against the Compensation Fund established pursuant to provisions of the Ontario New Home Warranties Plan Act.

The Fund exists to protect people who have been the victims of breaches of contract or other misfortunes arising from the hazards of home ownership and from the bona fide attempts people make to achieve home ownership and from the financial losses which may result to them from these.

The Applicant is a kindly-looking lady of decent and affable appearance who entered into a contract to buy a condominium unit. She made a down payment of \$9,500.00 and went into possession. The closing of the transaction appears to have been somewhat delayed and when the time eventually came for it to take place she decided not to go through with it. The official or technical reason for this decision to "opt-out" of the contract is said to have been the failure by the vendor to perfect the registration of the Condominium Declaration on or before January 1st, 1979, the date specified in the contract, but the real reason in the opinion of the Tribunal and as stated by the claimant in her testimony before us was that she had experienced a change of heart. She felt repudiation. Her responsibilities and her general position in life, her age, and the fact she was bringing up her granddaughter led her to back away from the perils of owning a home. She was candid in giving her evidence.

However, the technical reason advanced for her decision to avoid the contract fails, because in the Tribunal's opinion the direction or memorandum executed by her on the 21st of August, 1979 and which reads:

"TO: CORALD DEVELOPMENTS LIMITED
AND TO: Wenegara Corporation Limited

Please be advised that we are still willing to proceed with the closing of the sale to us of Unit Number 15 Queen's Court, St. Catharines, provided that title to the unit is conveyed to us by October 31st, 1979.

DATED at St. Catharines, Ontario, this 21st day of August, 1979.

Yours truly,

Florence Gough"

operates as a waiver of her right to opt-out of the contract on the technical grounds advanced, viz. that the declaration had not been registered by January 1st, 1979.

The Tribunal holds that the direction referred to, and the fact that the claimant executed and delivered the same, deprives her of the right to avoid the contract, as she has purported to do, upon the technical grounds stated.

It follows that the breach of contract which resulted from the conveyance not having taken place was a breach made by the claimant, not by the vendor. It follows further that her loss, which materialized when the vendor subsequently went into receivership and lost the ability to repay her deposit to her, even had she been successful in the action she brought to recover it, was a loss resulting from a decision which had been taken by her and which was a decision, as things turned out, which was probably a bad decision but certainly and at all events her own decision and not something which had been thrust upon her.

Before its unfortunate insolvency the vendor had brought an action against the claimant for specific performance of the contract which was consolidated with an action she had brought against the vendor for return of the deposit. The consolidated action appears to have in effect been abandoned in consequence of the insolvency but the vendor appears to have had a prima

facie defence to the claim for refund of the \$9,500.00 deposited; certainly her entitlement to the return of all or any part of it from the vendor, even if it were sufficiently solvent to pay remains uncertain, unproven and challenged.

The Fund exists to protect people who have been victims of misfortune beyond their control, but not those who are the victims of self-serving calculations which have misfired. Mrs. Gough took her decision to opt-out of the contract with her eyes open and after serious and deliberate study of what she perceived to be her own interests (and without any evident consideration or concern for the rights or interests of the other party to the contract). That she failed to perceive the possibility of the vendor's later insolvency and consequent inability to refund her deposit money was a misfortune but not one for which indemnification from the Fund is now available.

The claim therefore must be dismissed upon the grounds that it has not been established as one for which the Fund is liable and the Tribunal orders accordingly.

In passing, the Tribunal notes that the claimant has had the benefit of rent-free accommodation for a period of about two years, the value of which would appear to be about \$6,300.00, and unless the receiver is somehow able to recover this from her at a later date, which we think improbable, her loss has certainly been substantially offset.

PAUL GRAVES

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
D. MacFARLANE, MEMBER

COUNSEL: BRIAN M. CAMPBELL for the Respondent
NO ONE APPEARING for the Applicant

HEARING
DATE: January 6, 1982

REASONS FOR DECISION AND ORDER

There being no person present to represent the Applicant, and the Applicant himself not being present, and upon reading the Affidavit of Service which establishes, in the opinion of the Tribunal, full proof that the Applicant was served with a notice of this hearing - a hearing which was to take place at 1:30 in the afternoon of Wednesday, January 6, 1982 - and upon motion from the counsel for the Respondent, it is hereby ordered that this application be dismissed and that the Applicant's claim be refused.

THE ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 350

IN THE MATTER OF an Appeal from the decision of the
Corporation designated to administer the Ontario New Home
Warranties Plan Act

CARL GRONDIN

Applicant

and

THE CORPORATION DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Helen J. Morningstar, Member
Albert Longo, Member

Upon the matter coming before the Commercial Registration
Appeal Tribunal on the 9th day of July, 1982 in the presence of:

Brian Campbell, representing the Corporation

No one appearing for the Applicant

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the
Statutory Powers Procedure Act R.S.O. 1980, Chapter 484 and the
Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350
the Tribunal determines as follows:

The Claimant was given notice of the Appointment for
Hearing for July 9th, 1982 as evidenced by Exhibit 2 which
contains the further notice:

" if you do not attend at this hearing the
Commercial Registration Appeal Tribunal may proceed
in your absence and you will not be entitled to any
further notice in the proceedings."

Upon the Claimant failing to appear to pursue his claim and
there being no evidence before the Tribunal to support such
claim, the Tribunal directs the Corporation not to pay the
claim.

HALTON CONDOMINIUM CORPORATION #41

IN THE MATTER OF the CLAIM by
HALTON CONDOMINIUM CORPORATION #41
for damages

AND IN THE MATTER OF a requirement for
a hearing by Halton Condominium Corporation #41

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
JOHN CORSI, MEMBER

COUNSEL: MICHAEL A. SPEARS, representing the Applicant
BRIAN M. CAMPBELL, representing the Respondent

DATE: December 9, 1982

REASONS FOR RULING

Halton Condominium Corporation #41 (Halton) has made a claim against the New Home Warranty Program (Program) based on "a major structural defect" related to "a defectively constructed underground garage which has resulted in water penetration and a deterioration of the structure of the garage". [Exhibit 3 (6)]. The Garage is a common element.

The position of the Program stated to Halton is "the plan does not cover the common elements of condominiums which were registered prior to the effective date of the legislation. Halton Condominium Corporation #41 was registered December 19th, 1975 one year before the Act came into effect..." (Exhibit 1-B) Halton took the position that the letter was one of "rejection" and "as a result of this refusal we are appealing the decision of HUDAC (denying the claim) pursuant to section 16 of the New Home Warranties Plan Act, 1976. We are requesting a date for a hearing at your earliest convenience". (Exhibit 1-A) The Program took the position that the Tribunal "should have no jurisdiction". (Exhibit 6)

The Tribunal has held this meeting "to determine the entitlement of the Applicant to require the Tribunal to hold a hearing".

The Tribunal finds that the date of the registration of the declaration and description of Halton was December 19th, 1975, and that the option available under Regulation 726 section 16, subsection 2 of applying to the Registrar "for enrolment in the Plan of the common elements of any condominium project that

includes unsold homes and the date of registration for which has occurred prior to the 31st of December, 1976," was not exercised.

Of some 156 condominium dwelling units of Halton, 87 were sold after the 31st of December, 1976. Warranty certificates were issued in respect of the units so sold; no warranty certificate was issued in respect of the common elements. There is no provision in the Act for retroactivity. Not exercising the option is not the equivalent of failure to carry out an obligation imposed by the Act.

Accordingly, the Tribunal is of the opinion that Halton does not come within the provisions of the Ontario New Home Warranties Plan Act generally and of sections 13 and 14 specifically.

Halton has submitted that by virtue of the definition of "home" in section 1, paragraph (d), subparagraph iii, namely "a condominium dwelling unit, including the common elements" a warranty applies to the common elements in regard to the 87, and claims can be exercised on behalf of the 87 condominium dwelling units and accordingly an aliquot portion of the total damages should be recoverable against the Program.

The Tribunal does not agree. It is clear that the scheme of the Plan is such as to have a warranty in respect of the individual condominium dwelling units to be enjoyed by the owner of the individual condominium dwelling unit, and a separate warranty with respect to the common elements to be enjoyed by the Condominium Corporation, ie. Halton.

If it were otherwise it would mean, since the individual condominium units were sold at various times after the 31st of December 1976 that there would be a host of warranties with respect to the common elements each expiring at various times. A reading of the Statute and the Regulations passed thereunder shows that this was not the intent of the scheme propounded by the legislation. For example, it is clear that the warranty for common elements was to expire 5 years after the date of the registration. (see section 15)

The Program also took the position that "no decision has been written with respect to Halton" (under section 14 of the Act). Accordingly the Program submitted that "there are no grounds for appeal at present".

The Tribunal agrees. The letter of the 22nd of May, 1979 Exhibit 3, 14, subexhibit B) is a letter of information in reply to Halton (Shaw's letter of the 8th of March, 1979 Exhibit 1, 14 subexhibit A). Further, the letter of January 26th, 1982 Exhibit 1-B) is not a decision under section 14 but merely a statement of position taken by the Program.

The Tribunal is of the opinion that even if it had found that Halton came within the provisions of the Act there would be no entitlement to a hearing because there was no decision under section 14 in respect of which a notice requiring a hearing under section 16 could be given by Halton.

Halton has submitted that the Program is estopped from maintaining its position that Halton did not come under the provisions of the Act, and its position that the two letters hereinbefore referred to did not constitute a decision under section 14.

The Tribunal is of the opinion that the action of the Program in respect of other claims is not a basis upon which the doctrine of estoppel may be applied. In this regard the Tribunal is of the opinion that "estoppel is merely a rule of evidence and cannot create a substantive right in law which does not otherwise exist or impose a liability where the law imposes none", i.e. the doctrine cannot bring Halton under the Act, if the Act itself does not do so. Further, the Tribunal is of the opinion that no act was made during the course of the correspondence between Halton and the Program before or during the appeal process such as would estop the Program from maintaining that no decision under section 14 had been made.

On behalf of the Program it was submitted that no claim within the meaning of section 14 (1)(c) had in fact been made within four years after the warranty expired and therefore could not now be made.

The Tribunal does not agree. The Tribunal is of the opinion that the letter of the 8th of March 1979, Exhibit 3, item 14, subexhibit A, is a sufficient initiation of the claim as to enable the Tribunal to rule that the claim had been made within the time limited. The Tribunal is of the opinion that if the earlier findings had been in favour of Halton that there would have been a sufficient claim upon which the Program would have been called upon under the Statute and Regulations to make a decision.

Accordingly by virtue of the general authority vested in it the Tribunal Rules that there is no entitlement by the Applicant to a hearing under Section 16(2) of the Act.

* Note: The above ruling was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

THE ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 350

IN THE MATTER OF an Appeal from the decision of the
Corporation designated to administer the Ontario New Home
Warranties Plan Act

CARL HOBBS

Applicant

and

THE CORPORATION DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Harry Singer, Member
Lou Rice, Member

Upon the matter coming before the Commercial Registration
Appeal Tribunal this 11th day of March, 1982 in the
presence of:

Patricia Hennessy, representing the Respondent

No one appearing for the Applicant

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under the Ontario New
Home Warranties Plan Act and the Statutory Powers Procedure Act

The Tribunal finds that the Applicant was given notice
personally of the Appointment for Hearing for the 11th day of
March, 1982 as evidenced by Exhibit 2.

Upon the Applicant failing to appear to pursue his claim, the
Tribunal directs the Corporation not to pay the claim.

ONTARIO NEW HOME WARRANTIES PLAN ACT

IN THE MATTER OF a requirement for a hearing pursuant to the
Ontario New Home Warranties Plan Act.

AND IN THE MATTER OF a requirement for a meeting respecting the
jurisdiction of the Commercial Registration Appeal
Tribunal to hold a hearing.

NORMAN JAYE

Applicant

The Corporation under the Ontario New Home Warranties
Plan Act,

Respondent

BEFORE:

Matthew Sheard, Vice-Chairman as Chairman
Harry L. Singer, Member
Louis A. Rice, Member

Upon the matter coming before the Commercial Registration
Appeal Tribunal this 22nd day of July, 1982, in the presence of:

Norman Jaye, appearing in person

Patricia C. Hennessy, representing the Respondent

RULING

This was a meeting to determine whether the Tribunal had
jurisdiction to hear an appeal by the Applicant
from certain matters which were the subject of
conciliation decisions made pursuant to Section
17 of the Act.

Upon the facts and in accordance with the Tribunal's previous
decision in the case of Gratien St. Onge,
(reported P. 81, C.R.A.T. Vol. 8) the Tribunal
holds it has no jurisdiction in this matter and
Orders accordingly.

MR. & MRS. WAYNE KENNEDY

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
S. PUSTIL, MEMBER

COUNSEL: MR. W. KENNEDY, appearing in person
P. HENNESSY, representing the Respondent

HEARING
DATE: JULY 16, 1982

REASONS FOR DECISION AND ORDER

This hearing has been held for the purpose of considering the claim of Mr. & Mrs. Wayne Kennedy made pursuant to Section 16 of the Ontario New Home Warranty Plan Act. A claim upon the Compensation Fund established under the Act for relief on the grounds that a major structural defect exists at the claimant's home situate at 198 Curry Crescent, Newmarket, Ontario, and enrolled as #H849. The warranty certificate was issued August 18th, 1976. The Kennedys took possession after purchasing the home from the original owners in October 1979. Mr. Kennedy appeared on his own behalf and notwithstanding that he was not represented by counsel he presented his case such as it was, very well. He made a good impression on the Tribunal especially through his coolness during a most rigorous cross-examination.

The term "major structural defect" is defined in the Regulations to the Act at paragraph 0, formerly paragraph N of Part 1 of Bylaw #R1 of the said Regulations. The following is the definition:

"Major structural defect" means for the purposes of Clause B of subsection 1, subsection 13 of the Act. Any defect in workmanship or materials:

1. that results in failure of the loadbearing portion of any building or materially or adversely affects its loadbearing function or
2. that materially and adversely affects the use of such building for the purpose for which it was intended including:

further details therein after itemized.

In the present case the Tribunal finds that the use for which the Kennedy residence has been intended and is, in fact, being put to namely residential habitation is not materially and adversely affected in the way that would be necessary for the claimant to succeed under sub clause 2 of the said paragraph N. Nor is the Tribunal able to find that there exists in accordance with sub clause 1 of this said paragraph any failure of the loadbearing portion of this said building so as to materially and adversely affect its loadbearing function. In making this finding the Tribunal is bound by the very difficult interpretation of the definition of the term "major structural defect" over which it has agonized during the course of many previous cases.

A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse. The only problem disclosed in the evidence which caused us sufficient concern to proceed with this hearing was the crack in the south east corner of the garage wall, and it was in order to give us further information of this problem that we particularly closely studied the evidence adduced by the Program, evidence of two technical representatives who also not expert witnesses by any means, were able to give us a sufficiently clear idea of the situation at 198 Curry Crescent to enable us to come to a decision which, notwithstanding our sympathy for the claimants and the fact that we would be delighted to help them had we been able to see our way clear to do so under the limitations of our position, must be a decision dismissing the claim, and therefore the Tribunal now confirms the respondent's original decision and Directs that this claim be, and the same is by this Order, hereby disallowed.

HAIG KOUYOUMDJIAN

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L SINGER, MEMBER
DON MacFARLANE, MEMBER

COUNSEL: HAIG KOUYOUMDJIAN, appearing in person
PATRICIA HENNESSY, representing the Respondent

HEARING
DATE: August 25, 1982

REASONS FOR DECISION AND ORDER

This has been a hearing brought pursuant to s.16 of the Ontario New Home Warranties Plan Act to consider a claim by Mr. Haig Kouyoumdjian brought pursuant to s.13(1)(b) of the Act that his home situate at 29 Cleethorpes Blvd., Agincourt, Ontario has a major structural defect as defined by the Regulations to the Act to wit Bylaw R1, Part 1, Section 1, paragraph (m).

Occupation of the subject premises had commenced in the summer of 1977 and no claim had been brought in writing or otherwise during the first year. Specifically the claim was in two parts. First that there had been water seepage through cracks in the basement walls and second there had been cracking and subsidence in the garage floor. In order to succeed it was incumbent upon the claimant to prove the existence of a major structural defect as defined at paragraph (m) of the said S.1, Part 1 of Bylaw 1 in the Regulations to the Act which reads as follows:

Major structural defect means for the purposes of clause (b) of subsection 1 of S. 13 of the Act, "any defect in workmanship or materials (i) that results in failure of the load-bearing portion of any building or materially affects its load-bearing function or (ii) that materially and adversely affects the use of such building for the purposes for which it was intended.

Upon hearing and considering the evidence the Tribunal holds that no failure is present in the load-bearing portion of this building which affects its load-bearing function or otherwise. In order to succeed the claimant would resultingly be obliged to rely on subparagraph (ii) of the said paragraph. The Tribunal, again upon hearing and considering the evidence educed before it holds that the water seepage through cracks in the basement walls into the basement as described in the evidence is not sufficient to enable his claim in that regard to succeed and the same is accordingly disallowed.

In respect to the second problem, the subsidence in the garage, the evidence is that a crack and a 5 to 7 inch depression exist in the floor of the garage. This has been established to the Tribunal's satisfaction by the evidence of the claimant both in words and by means of photographs and has been admitted in the testimony of the respondent's witness Mr. Stinson, the Program's Toronto Manager.

The question the Tribunal has asked itself in respect to this part of the claim has therefore been, does the existence of this 5 to 7 inch depression in the middle of this garage floor materially and adversely affect the use of this garage for the purpose for which it was intended. To decide this we have asked ourselves "what was that intended use?" What would a reasonable person deem its use to be, reasonably speaking. Counsel for the respondent urged that it was "storage": viz., Storage of one or two motor cars and garden equipment. We agree, but we have been unable to escape the conclusion, based not only on the evidence set before us, that the normal or reasonable use or uses for which a garage such as this ought to be deemed intended might include effecting simple repairs such as the changing of a tire from time to time, or perhaps washing the cars stored in it from time to time. In the event that a car should be washed in this garage the depression and the crack present in this garage floor might well lead to water penetration into areas where the same could do damage or otherwise constitute or cause an adverse affect. Such is the Tribunal's finding.

And when we asked ourselves whether any reasonably prudent person would in the course of normal or prudent conduct wish to place a jack under a car in such a garage as this with a 5 or 7 inch depression and the floor sloping downward, we concluded that the answer was "no".

This case was brought and argued by a claimant whose native tongue is Armenian and whose fluency in English, the language in which this hearing was conducted, is very much limited. He was assisted by his son who did a good job but who is obviously limited in his experience of courtroom procedure. No direct evidence was led that cars were washed in this garage although mention was made of repairs - it was said

these could not be done safely in this garage although the owners would have wished to do so from time to time. We do not feel that was strictly necessary. The Tribunal can infer what are the uses for which a garage such as this was intended. The depression in this garage floor resulted from settling of the soil beneath the floor and this was a problem which Mr. Stinson fully admitted was abnormal and would have been covered by the one year warranty.

Having deliberated at length and having attempted to do so with the full measure of fairness which it is our duty to apply, the Tribunal cannot find that the intended use of this garage is not adversely affected by the problems which have been proven to exist and accordingly the Tribunal allows this claim in respect of the garage floor and directs the program to remove and replace the same forthwith.

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act,

The Tribunal directs HUDAC New Home Warranty Program to replace the claimant's garage floor but disallows the claim in respect of the alleged cracks in the basement wall.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

CAMILLO LAGANA

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
JOHN HURLBURT, MEMBER

COUNSEL: CAMILLO LAGANA, appearing in person
BRIAN CAMPBELL, representing the Respondent

HEARING

DATE: March 2, 1982

REASONS FOR DECISION AND ORDER

The claimant has brought a claim pursuant to section 16 of the Ontario New Home Warranties Plan Act. This claim was in respect of a certain crack or cracks in a brick stoop - a porch or verandah at the front of the claimant's house. The evidence showed this structure to be a free-standing appurtenance to the building which is independent, in a load-bearing sense, from the rest of the structure: i.e., it is not a load-bearing member or portion of the building. In consequence of these cracks we can perceive no threat to any load-bearing part of the building or, so far as we can determine, to the essential use for which the building was intended: i.e., habitation. The claimant has, in consequence, failed to establish a prima facie claim for relief under the warranty provided by the Ontario New Home Warranties Plan Act.

Reference was made by Mrs. Lagana during the course of her testimony to another crack in the wall of the house. This was the first time, so far as the Tribunal is aware, that the existence of such a defect was brought to the attention either of the Warranty Program or of the Tribunal. Any claim in respect to any such crack in the main wall of the house would have to be the subject of a further (originating) application to the Warranty Program and will not be considered by the Tribunal at this time.

The protection afforded by the warranty during the second, third, fourth and fifth years of the warranty period is protection in respect of "major structural defects" as defined both in the regulations to the Act and as elucidated in previous decisions of the Tribunal.

The claimant has failed to establish the existence of same and consequently this claim must be dismissed.

The Tribunal disallows this claim and directs the Corporation to refuse payment of it.

LUKE LAURIN

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY L. SINGER, MEMBER
MARTIN SHAKESPEARE, MEMBER

COUNSEL: LUKE LAURIN, appearing in person
BRIAN CAMPBELL, representing the Respondent

HEARING
DATE: August 16, 1982

REASONS FOR DECISION AND ORDER

The Applicant's claim is based on the existence of three cracks in the basement walls as described in Exhibits 5(a) and 5 (c)(1) and shown in Exhibits 6(a)(b) and (c) which permit the leakage of water into the basement. Not having given written notice of the matter to the respondent within one year the Applicant must bring the claims within the description of a major structural defect to succeed.

Upon a consideration of the evidence of the Applicant and that of the inspector, the Tribunal finds that the defects do not come within the meaning of the definition of major structural defect. The Tribunal finds that the cracks do not result in the failure of the load bearing portion of the building nor materially or adversely affect its load bearing function, nor materially and adversely affect the use of such building for the purpose for which it was intended. The cracks do not come within the inclusions set out in the definition.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, Revised Statutes of Ontario 1980, Chapter 350, the Tribunal directs the Corporation not to pay the claim.

FRED C. MALTMAN

APPEAL FROM DECISION OF THE
CORPORATION DESIGNATED TO ADMINISTER
THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY L. SINGER, MEMBER
WALTER FUNK, MEMBER

COUNSEL: ALBERT STRAUSS, representing the Applicant
BRIAN CAMPBELL, representing the Respondent

HEARING
DATE: November 22nd, 1982

REASONS FOR DECISION AND ORDER

The claim, in the fourth year of possession of the home is in respect of penetration of water through the roof. The Tribunal finds that although certain earlier defects referred to in the inspector's reports may have been rectified, there remained defects in workmanship as set out in Exhibits 4 and 5, as a result of which water continued to penetrate during rain into the home entering at certain potlights and window valances necessitating the use of pots to catch the water and resulting in carpet stains. It would appear that the defects have been remedied at a cost of \$572.47.

It is submitted by the claimant that the defects come within a part of the definition of major structural defect namely Regulation 1 (o)(ii) which reads:

"that materially and adversely affects the use of such building for the purpose for which it was intended",

The Tribunal does not so find. Although it may be disconcerting, upsetting and to a degree discomfoting to use the room under the leaking conditions, the Tribunal is of the opinion that conditions created, as placed in evidence before the Tribunal did not come within the descriptive terms both "materially and adversely".

Accordingly by virtue of the authority vested in it under Section 13(1) of the Ontario New Home Warranties Plan Act, the Tribunal Directs HUDAC New Home Warranty Program to disallow the claim.

JOHN D. MORRISON

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
D. H. MACFARLANE, MEMBER

COUNSEL: SUZANNE BRUNET, agent on behalf of the Applicant
BRIAN M. CAMPBELL, counsel for the Respondent

HEARING

DATE: January 6, 1982

REASONS FOR DECISION AND ORDER

The Applicant J. D. Morrison has appealed from a Decision of the Corporation established under the Ontario New Home Warranties Plan Act rejecting four items of complaint which are listed in Schedule A(2) of the Inspection Report entered as Exhibit 3. These items related to an allegedly non-operative master bedroom heat duct, a cold kitchen floor possibly resulting from inadequate insulation, a water stain on a kitchen ceiling resulting from leakage from a plumbing pipe which had been repaired and finally a matter of some dying cedar trees which said final item of complaint was withdrawn by the agent for the Applicant leaving only the first three items to be considered by the Tribunal.

Dealing first with item 3 the ceiling stain the Tribunal finds that this complaint is not covered by the warranty given under the Ontario New Home Warranties Plan Act because it is of a cosmetic rather than a functional nature. Moreover, we have seen or heard inadequate evidence by way of proof of existence of this complaint even if it were a proper one.

Items 1 and 2 may be disposed of together. In each case the complaint has not been proven. We have received no information at all in support of these claims. Therefore the Tribunal is unable to take any action. It is obliged to dismiss the application.

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under the Ontario New Home Warranties Plan Act, Revised Statutes of Ontario 1980, Chapter 350,

The Tribunal rejects this application on the basis of inadequate evidence.

JOSEPH D. PORTER

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS RICE, MEMBER

COUNSEL: JOSEPH D. PORTER, appearing in person
BRIAN M. CAMPBELL, representing the Respondent

HEARING
DATE: December 1, 1982

REASONS FOR DECISION AND ORDER

Two issues are raised by the facts of this case. The first is whether Mr. Porter when he notified MacDonald the builder of the problems which have been the subject of this hearing within the one year period, the period of the one year warranty, did by construction (or inference of law) notify the Warranty Program. It has been settled that notification of the Warranty Program must be and may only be accomplished by notice in writing served upon or mailed to the Warranty Program at one of its offices. Notice to any other person or given in any other way will not suffice. On the evidence the first issue can only be resolved by the Tribunal finding the Warranty Program was not notified within the one year period of the warranty described in section 13 of the Act.

The Tribunal also holds upon due consideration that the warranty given by this Act begins to run on the date of the Certificate of Completion. The relationship between the owner and the Warranty Program begins on that date and upon no other, although other warranties or guarantees possibly arising from work done by contractors may run from the date of the completion of such work. The relationship, as stated, between the Warranty Program and the owner begins upon the date of the certificate of completion which is usually the date on which occupation begins.

Consequently the only kind of claim this Applicant could possibly have under the warranty provided by the Act would be a claim for a major structural defect.

The second issue therefore is whether or not the Applicant has established the existence of a major structural defect - that is to say, a major structural defect as defined by the Regulations. There is no question that problems exist nor is there any doubt that the problems are very annoying and that they make life to some considerable extent less enjoyable for the occupants of this home than it would be if these problems were not there. Mr. Porter has satisfied us concerning these problems and that they are there and we concede that they are defects but what he has not done, and what we feel no one could do no matter how eloquent or able (and Mr. Porter has presented his case extremely well), is to prove that these particular defects are major structural defects within the meaning and definition of the same provided by the Act and its Regulations. We find he has not.

Mr. Porter brought the problems to the attention of the builder. The builder was taking an active interest in them and he was making the necessary repairs. That was quite proper. In all probability he would have reattended to complete these repairs or to bring them up to date had he not quite suddenly gone out of business - we assume because of insolvency. It was subsequent to this point in time that Mr. Porter first brought matters to the attention of the Warranty Program, namely in February of 1982. It was then too late. It was well past the one year specified.

It seems that Mr. Porter is a victim of circumstances. He has our sympathy but having regard for the law, which is inflexible, we are unable to render a decision in his favour. Consequently, and with regret, the Tribunal finds itself unable to allow this claim and is obliged to order that it be rejected.

M. SMOLCIC

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: M. SMOLCIC, appearing in person
PATRICIA HENNESSY, representing the Respondent

HEARING
DATE: October 5th, 1982

REASONS FOR DECISION AND ORDER

The existence was alleged of a "Major Structural Defect" as defined by the Ontario New Home Warranties Plan Act and in its Regulations and such was the basis of this claim. But the evidence disclosed nothing more serious than certain small cracks in the basement wall, cracks of the type frequently observed in the normal course of events as a building matures and which are the proper subject of periodic repairs by way of ordinary maintenance. The claimant appeared to think that it was the Ontario New Home Warranty Program's function to attend to such matters under the warranty - possibly in consequence of foolish and misleading advice received from some ill-informed quarter and which had created a serious misimpression in his mind as to the extent of the service which the Program is able or properly and reasonably to be expected to provide.

The decision of the Tribunal is that this claim fails because the problem complained of was not a Major Structural Defect.

V.M.A. CONSTRUCTION LTD.
(VITTORIO VACCA)

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PROGRAM

TO REFUSE TO RENEW THE REGISTRATION
OF THE APPLICANT

TRIBUNAL: MARY JANE BINKS RICE, VICE-CHAIRMAN AS CHAIRMAN
MATTHEW SHEARD, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: VITTORIO VACCA, appearing in person
BRIAN M. CAMPBELL, representing the Respondent

HEARING
DATE: February 9th, 1982

REASONS FOR DECISION AND ORDER

We have reviewed the evidence submitted as to the financial statement (Exhibit 5) filed of the financial position of the Applicant company which indicates a deficit, for the financial year ending June 30, 1980, of \$160,215.00.

We believe that this statement has given rise to a well-founded doubt on behalf of the Registrar as to the Applicant's financial responsibility.

Section 7(1)(c) states that an Applicant which is a corporation is entitled to registration by the Registrar except where, having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings.

In light of the financial statement, the Registrar's request for a personal guarantee from the principal shareholder the Applicant is fully reasonable and the Applicant's refusal is completely unreasonable.

The Tribunal therefore orders and directs the Registrar to carry out his proposal and to refuse to renew the Applicant's registration under the Plan unless, within thirty days of the date of this order, the Applicant shall have furnished him with the personal guarantees of the Applicant's principal shareholders, together with duly authenticated statements of their net worth.

THE ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 350

IN THE MATTER OF an Appeal from the decision of the
Corporation designated to administer the Ontario New Home
Warranties Plan Act

T. GARY WALLER

Applicant

and

THE CORPORATION DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

Respondent

BEFORE:

John Yaremko, Q.C., CHAIRMAN
Harry Singer, MEMBER
L. Rice, MEMBER

Upon the matter coming before the Commercial Registration
Appeal Tribunal this 16th day of March, 1982 in the
presence of:

No one appearing for the Applicant

Brian Campbell, representing the Corporation

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under the Ontario New
Home Warranties Plan Act, R.S.O. 1980, Chapter 350 and the
Statutory Powers Procedure Act, R.S.O. 1980, Chapter 484

The Tribunal finds that the Applicant was given notice
personally of the Appointment for the 16th day of March, 1982
as evidenced by Exhibit 2.

Upon the Applicant failing to appear to pursue his claim, the
Tribunal directs the Corporation not to pay the claim.

C. RAY WEBB

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY SINGER, MEMBER
S. PUSTIL, MEMBER

COUNSEL: C. RAY WEBB, appearing in person

PATRICIA HENNESSY, representing the Respondent

HEARING

DATE: March 12, 1982

REASONS FOR DECISION AND ORDER

At the outset we would like to say that one of the functions of the Tribunal is to attempt to interpret the Ontario New Home Warranty Plan Act, an Act passed in 1976, in areas where there appears to be uncertainty or controversy as to its effect or intent. Today's hearing has given us the opportunity of considering at least one particular point which so far as we know has not been settled before. Therefore, the Claimant Mr. Webb is entitled to the expression of our appreciation not just on behalf of the Tribunal but also on behalf of the Warranty program and those who administer it and on behalf of the consuming public at large for having brought forward this important point for consideration and adjudication.

In its earlier decision in the case of Kartar Singh released July 9th, 1981 the Tribunal held that claims arising against the Fund must be brought to the notice of the Warranty Program within the time delimited by the Statute, that is to say within 5 years in respect to major structural defects and within 1 year in respect to all others and that notification of the builder was not constructive notice to the Warranty Program and that the notification required must be brought to the direct attention of the Warranty Program, and no other person or entity in order to suffice.

In the case before us today, it has been alleged that the problem or problems complained of constitute a major structural defect. Upon the evidence the Tribunal holds that this is not the case, that the defects in question do not satisfy the definition of a major structural defect as provided by the Regulations to the Act and as further interpreted by the previous decisions of this Tribunal.

In order to succeed in this claim it was therefore incumbent upon Mr. Webb the Claimant to establish that his claim was either properly brought within the one year period or ought to be deemed properly so brought.

Mr. Webb took possession of his house in October 1977. It appears from the evidence before us that through no fault of his, but rather through the fault of the builder, he never received a Certificate of Completion and Possession. It appears that normally the Certificate of Completion and Possession is filed by the builder with the Warranty Program and that this act triggers the issuance by the Warranty Program of the Warranty Certificate. Also that the Certificate of Completion and Possession lists upon it deficiencies such as items not completed or not completed properly. It is not apparently the practice of the Warranty Program to treat the deficiencies so listed on the Certificate of Completion and Possession as the subject of the written notice stipulated in Reg. 4(1) to the Statute.

In this case it has been alleged that the deficiencies complained of were brought to the attention of the Warranty Program by means of certain telephone conversations which may or may not have taken place between the Claimant and certain employees of the Warranty Program and further alleged that such conversations occurred before the expiry of the critical one year period. But learned counsel for the Warranty Program has argued that the only proper notification of the Warranty Program which would comply with the requirement of the Act and its Regulations must be written notice - not verbal notice, not constructive notice, not reference to incomplete items in the Certificate of Completion and Possession - but written notice specifically referring to the problems in question and properly delivered to, served upon, or posted to the Corporation within the proper time as provided in Reg. 4(1). The Tribunal accepts this argument and holds that this is the true and proper interpretation of this point which is the crux of the problem before us at this hearing.

The unfortunate irregularities which occurred in this case did not absolve the Claimant from the duty of compliance in this regard as stated.

The Tribunal affects no discretion - not upon the facts of this case - to find verbal notice - even if proven - to suffice.

The law is a matter of public notice, ignorance of the law is of no avail. Failure by the builder to file the Certificate of Completion and Possession in this case did not alter the fact that the Claimant took possession in October 1977 and that the 1 year warranty lapsed one year thereafter and that no claim pursuant to it would be valid unless communicated to the Warranty Program in writing as provided by Reg. 4(1) as aforesaid.

The Tribunal thanks the Claimant Mr. Webb for raising this interesting and important point and for affording it the opportunity of settling it for the benefit of others in time to come.

However, for the reasons stated, the Tribunal must disallow this claim and consequently directs the Corporation not to pay it.

HAYWOOD WELTON and BEVERLEY GUN-MUNRO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW
HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
JOHN CORSI, MEMBER

COUNSEL: F. SETH COOK, representing the Applicant
BRIAN CAMPBELL, representing the Respondent

HEARING

DATE: August 5th, 1982

REASONS FOR DECISION AND ORDER

On April 18th, 1979 an Agreement of Purchase and Sale which has been entered at this hearing as Exhibit 8 was made between the Applicants and Apple Wellesley Developments Inc. in respect of certain lands and premises on Owl House Lane, Toronto. The purchase price therein recited was to be a cash deposit of \$1,000 and on closing the purchasers were to assume a first mortgage of \$78,750 in favour of Vanguard Trust Company and the balance was to be covered by a second mortgage and a cash payment. By subsequent agreement set out in an instrument in writing dated November 1st, 1979 (Exhibit 5(2)) between the Applicants and Apple Wellesley Developments Inc. the parties purported to amend the said Agreement of Purchase and Sale of April 18th, 1979 and such agreement reads in part as follows:

Notwithstanding the terms of the Agreement, the Vendor and Purchasers covenant and agree as follows:

1. The purchase price shall be \$105,000.00 of lawful money of Canada payable to the Vendor as follows:
 - (a) a deposit payable to Darrell Kent Real Estate Ltd., in trust in the amount of \$1,000.00 to be credited on account of the purchase price on closing and to be held by the Vendor in accordance with the terms of this Agreement;

- (b) by the assumption by the Purchasers of a first mortgage in favour of Vanguard Trust of Canada Limited in the amount of \$78,750.00;
- (c) by the giving of the purchasers and the accepting by the vendor of a second mortgage in the principal amount of \$6,750.00 ;
- (d) and for the balance of the purchase price being \$19,000.00 the vendor hereby grants to the purchasers the right to set off monies owing by it to Haywood Welton, carrying on business as A & W Drywall; the total purchase price is subject to the usual adjustments...

On the 3rd of December 1979, a further Agreement in writing was executed between Apple Wellesley Development Inc. and Haywood Welton carrying on business as A & W Drywall which reads in part as follows:

Apple Wellesley Developments Inc. hereby agrees to accept, with respect to the purchase of Unit 2, Level 1, Owl House Lane Condominium Project by Haywood Welton and Beverley Gun-Munro, as a set off against the cash portion of the balance due on closing and against \$9,500.00 on account of the principal sum of the second mortgage back to the Vendor (both as more particularly set out in the agreement of purchase and sale dated and accepted the 18th day of April, 1979), the total sum of \$19,000.00 now owing by Apple Wellesley Developments Inc. to Haywood Welton, carrying on business as A & W Drywall and further acknowledges that this sum of \$19,000.00 has been received on account of the purchase price.

Haywood Welton, carrying on business as A & W Drywall hereby acknowledges receipt of payment to it of \$19,000.00 on account of monies owing by Apple Wellesley Developments Inc. to it, by way of a set off in the amount of \$19,000.00 on account of the purchase price of Unit 2, Level 1, Owl House Lane Condominium Project by Haywood Welton and Beverley Gun-Munro.

Later the Applicants received title to the subject property, namely the new home on Owl House Lane, but they received it not from the Vendor named in the Agreement of Purchase and Sale but from a mortgagee in possession under power of sale. The Applicants did not receive credit for the \$19,000.00 referred to in the agreement of December 3rd, and were obliged to otherwise make up that amount to the eventual grantor of title.

The Applicants approached the Warranty Program and claimed payment for said sum of \$19,000.00 from the Compensation Fund established under the provisions of the Ontario New Home Warranties Plan Act. In reply to that claim they received a letter, Exhibit 6 over the signature of V. A. Nelligan which reads in part as follows:

The Warranty Program has had an opportunity to review your claim for a deposit refund in the amount of \$19,000.00 as evidenced by a document entitled "Amendment to an Agreement of Purchase and Sale" dated November 1st, 1979, which purports to amend the prior Agreement of Purchase and Sale in respect of a condominium unit in Owl House Lane.

DECISION

Upon review of the documentation which has been submitted in support of the claim, it is the decision of the Warranty Program that the \$19,000.00 which the aforesaid agreement characterizes as set off monies owed to Haywood Welton carrying on business as A & W Drywall by the vendor, Apple Wellesley Developments Inc., are not deposit monies and cannot be recovered as such from the guarantee fund of the Warranty Program. The Program advises that the debt that existed between A & W Drywall and Apple Wellesley, prior to the existence of the Agreement of Purchase and Sale and the amendment thereto, being a prior existing debt and not related in any way to the proposed purchase of the aforesaid unit, cannot be the subject matter of a deposit refund claim or payment out of the guarantee fund of the Program.

From that decision the Applicants have appealed to this Tribunal. The basis of their claim against the guarantee fund is that the said \$19,000.00 was a "deposit" within the meaning of the definition provided by Regulation 726 part 1, sub-paragraph (1) which reads in part as follows:

"deposits" means, in respect of any home, all monies received before the date of possession by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement.

Having heard or read the evidence set before it and upon hearing what was said by counsel for both parties in argument at this hearing, the Tribunal holds that the sum of \$19,000.00 was not a deposit within the meaning of the Act and its Regulations. We find that it was a prior existing debt owing from Apple Wellesley Developments Inc. in respect to

construction services and supplies and not a proper subject for a deposit refund claim. In reaching this conclusion the Tribunal is bound by its previous decisions in the case of Mario De Rocchis reported at Commercial Registration Appeal Decisions, Volume 8, p. 31, and by the case of McDonagh and Palmerio also reported in Volume 8, at p. 62.

We would note in passing that a builder or sub-contractor such as the present claimant, Mr. Welton, is a member of a class intended to be protected by other remedies provided by our law in Ontario such as the Mechanic's Lien Act, or an action for debt. By electing to clothe himself and his co-applicant in the status of a New Home Warrantee, i. e. the beneficiary of a warranty, he has snuffed out or disclaimed those other remedies possibly thinking the route that he and his co-claimant have taken to be an easier road. But this is not the case. The guarantee fund exists for the benefit of new home purchasers properly so-called and not for the benefit of contractors and sub-contractors whose proper remedies as stated, lie elsewhere. Even if we were not bound by previous decisions - as we are - the Tribunal would be reluctant to open the door to this sort of claim which is quite contrary to the spirit of the legislation, legislation enacted to give protection to the public.

ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 350

IN THE MATTER OF an Appeal from the decision of the Corporation designated to administer the Ontario New Home Warranties Plan Act.

RONALD AND KATHLEEN WHETSTONE

Applicants

THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

BEFORE:

Matthew Sheard, Vice-Chairman as Chairman
Harry L. Singer, Member
John Corsi, Member

Upon the matter coming before the Commercial Registration Appeal Tribunal on the 4th day of August, 1982 in the presence of:

Brian Campbell, representing the Corporation

No one appearing for the Applicants

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act R.S.O. 1980, Chapter 484 and the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350 the Tribunal determines as follows:

1. The Claimants were given notice of the Appointment for Hearing for August 4th, 1982 as evidenced by Exhibit 2 which contains the further notice:

"...if you do not attend at this hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

2. Upon the Claimants failing to appear to pursue their claim and there being no evidence before the Tribunal to support such claim, the Tribunal directs the Corporation not to pay the claim.

MAN PONG WONG

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MARY JANE BINKS RICE, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
WILLIAM WATSON, MEMBER

COUNSEL: MAN PONG WONG, appearing in person

PATRICIA HENNESSY, representing the Corporation

HEARING

DATE: July 7, 1982.

REASONS FOR DECISION AND ORDER

This was a claim in which the existence was alleged of major structural defects as defined by the Act and its Regulations - specifically a sagging in the hallway floor area of the property on the first floor and black mould spots in the corner ceiling areas in the bathroom and two bedrooms.

The Claimant testified that he noticed these problems gradually before filing his proof of claim in November 1981. He does not know if these problems were completely apparent prior to November 1979 (one year from his purchase of the property). The Claimant did not contact Hudac within one year of his purchase but he testified that he contacted the builder prior to November 1979. The Claimant testified that the problem was a 2" sag in the hallway area but he had not measured the deflection in question. One witness Mr. Betts for the Respondent testified that the sag was less than 1/2" and that he had measured it; the other witness for the Respondent testified that there was no apparent sag.

The Tribunal finds that the Claimant has failed to establish that these problems, in any way, satisfy the criteria heretofore laid down as constituting major structural defects. The claim is accordingly dismissed.

YORK CONDOMINIUM #340

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED TO ADMINISTER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT, 1976

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: DAVID A. POTTS and

MICHAEL SPEARS, representing the Applicant

BRIAN M. CAMPBELL, representing the Respondent

HEARING
DATES:

REASONS FOR DECISION AND ORDER

The Appellant's claim is made under Section 14 1(c) of the Ontario New Home Warranties Plan Act, 1976. During the course of the hearing the claims were narrowed to these, namely regarding:

- (a) faulty insulation application and no vapour barrier at the top level plenum space allowing water penetration;
- (b) deterioration of concrete curbs forming bases of the windows and faulty insulation allowing water penetration;
- (c) deterioration of concrete forming base of balcony railings;

(Claims (a), (b) and (c) related to the low-rise structures - Buildings A, B and C.)

- (d) inadequate flashing and no vapour barriers on the roof systems extending easterly and westerly from second storey level of high-rise.

(This claim related to the high-rise structure-Building D.)

- (e) cracking of concrete and water penetration through roof slabs of P1 and P2 parking levels.

(Relating to the parking structure.)

In order for the Appellant to succeed, the matters in respect of which claims are made must be such as would come within the meaning of Major Structural Defect as defined in paragraph 1. (m) (Part 1) By-Law R-1 under the Act, namely:

"major structural defect" means for the purposes of clause b of subsection 1 of section 13 of the Act, any defect in workmanship or materials

- (i) that result in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended, including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

IN RESPECT OF ITEM (a), PLENUM SPACE WATER, the Tribunal finds that there are defects in workmanship or materials in that the styrofoam slabs affixed to the surface of the spandrel beam and other concrete surfaces in the plenum space have in several places become detached by reason for a failure in the adhesive capacity of the supposedly adhesive substance by which they were meant to be affixed to such surfaces. Such detached slabs, intended to function as insulation, have in several places actually fallen away from the surfaces they were meant to cover and where and when such surfaces were cold, often

exceedingly so in winter, substantial condensation occurred which helped spoil the plaster ceilings over the living areas below. The Tribunal is unable, however, to determine the extent to which such defects in workmanship or materials have been the real causal factors leading to the adverse effects complained of and finds that the Appellant has failed to establish that these are not excluded from warranty by operation of S. 13(2)(e), thereby discharging the onus of proof which is incumbent upon it and which it must discharge in order to succeed. S. 13 (1) and (2)(e) read as follows:

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner, and is free from defects in material,

(ii) is fit for habitation; and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection 1 does not apply in respect of,

(e) [inter alia] damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation....

The Tribunal heard a great deal of evidence, much of it interesting, some of it repetitive, and some of it quite horrendous concerning the excessive condensation of water which was taking place inside certain of the units and within the plenum space above the ceilings of these units and in which the very terrible effects of this excessive condensation were described. A number of the owner-occupants of these units gave evidence and some brought samples, specimens of mouldy wallpaper and bits of plaster and other debris, all of which added up to a sad story about the terrible things that can happen inside an apartment (or condominium unit) when the humidity-condensation factors go wrong, especially in winter. The Tribunal heard and accepts as true that the units are damp and wet and that in consequence the ceilings are saturated with water, especially near the windows and beneath the spandrel

beams above, inside the plenum spaces, and as well that mould infests the walls and wallcoverings, especially near the windows, and even that the curtains have gone mouldy and that the carpets especially at the same places, are both damp and mouldy and even, on cold mornings, hoary. This evidence was strong and moving and the Tribunal was gripped by it and was filled with the wish to help these unfortunate owner-occupants; what it craved was convincing proof that the strength was with it - present in the Statute and bestowed upon it, the Tribunal - to give that aid.

What the Tribunal heard during the hearing in the course of the instruction it received from expert witnesses and in its own review of this entire matter of excessive condensation in residential units such as these has left it with the following impression, namely that the presence of humidity or moisture (water) in the air, is the normal result of perfectly normal factors associated with the presence of humanity. Unless it has been completely "wrung out" by freezing or sub-freezing conditions in the place it came from, air, when it enters an area inhabited by people will generally have some moisture in it to start with and it will have an extraordinary and surprising capacity to acquire more and more moisture depending upon a) the degree to which it is warmed, (b) the things that are (happening in that area which it has entered, and (c) the length of time over which it lingers in that area before it is exhausted and replaced.

In these residential units the air which entered was soon warmed by an efficient heating system consisting of hot coils (coils of tubing full of very hot water) through which the air was induced to pass by fans. And there seems no doubt that the occupants - healthy and active generally adult persons, were present in most units in quite abundant numbers - possibly to the extent that the average unit population density was as much as half again that of the average apartment unit in the province at large. These were owner-occupied units, units occupied by owners not tenants, reasonably substantial citizens with well-grown families as opposed to the sort of citizens who comprise the occupants of most rental or apartment units, to wit, single persons often elderly or quite young people or young married famial units, with fewer and younger children than here in these occupant-owned circumstances where we judge the groupings to be denser, and in terms of average age closer to the adult mean.

All sorts of normal activities would then bring to bear their effects upon this air thus introduced into these congenial yet very fully inhabited condominium homes: cooking and baking and food preparation generally; washing of every kind, not only the laundering and washing of clothes and dishes and the drying of the same but also frequent showers and baths and ablutions no doubt performed many times daily; also there would be the moist emanations in many units of plants, humidifiers, steam irons and finally the release of moisture from the inhabitants themselves through those contributions to the general humidity of the human functions known respectively as the functions respiratory and perspiratory.

The process, which may be either natural or mechanical, by which air both enters and exits, arrives and leaves, circulating through at an appropriate rate of speed in order to obviate the adverse effects which would result from the absence of the same, is known as "ventilation". In older formats where the residential units traditionally consisted of buildings known as detached or semi-detached houses, ventilation, especially in winter, took place naturally - that is to say through many and abounding cracks and crannies and was speeded-up by heating systems consisting more often than not of furnaces in the bottom story where the process of combustion sucked air, which had originally and recently entered as stated, through and from every room of the house, down into the combustion chamber, into the fire box and thence up and out through the chimney.

This is what engineers are pleased to call the "natural" ventilation of a house in winter. But in units such as those with which the applicants are concerned there are no furnaces or fireplaces, no chimneys, and above all no cracks and crannies with attendant and unwelcome cold drafts. Ventilation from such "tight", super-insulated modern units, both in summer and, although we may often not realize it, equally necessary in winter as well, must be provided by those means which are known as "artificial" or "mechanical".

Abundant evidence was led by both sides that a sophisticated and consciously planned system of mechanical ventilation has been provided for these premises.

Yet the contention which both sides prosecuted with equally great heat was whether or not such mechanical ventilation system was adequate to the task before it or, if so, actually being employed - adequately or at all.

Mr. Angus, expert witness called for the Respondent, swore

that there was an arrangement whereby air from outside was drawn into a duct and thence passed through warming devices and was released into the internal halls whence it was ostensibly intended to enter the units by passing under, around or through the doors. But the purpose of this design was thwarted, he said, since this warm dry air (dry, in winter, since it came from the frigid out-of-doors; warm since we would wish to assume - it had been warmed as aforesaid), which was the very thing to neutralize and carry-off the dangerous water-load of the air present in units, was not being allowed to enter the units because the doors, giving access to the units from the hallways where the warm dry air awaited entry and circulation, were sealed and impervious to the kind of penetration essential to the working of that ventilation plan. Moreover, he told us, the exhaust system, whereby the old wet air would be drawn out to make way for the new warm dry air, inducing it to enter, were stopped-up or otherwise non-functional. They worked by switches to be turned on or off by the owner-occupants. Clearly they would only be turned on - even if their fans and vents were adequate to the task, which was in contention - only if these persons had the will and inclination to do so and that, in turn, would depend on the degree to which they appreciated the vital importance to their interests of so doing. Though in the Tribunal's view upon the evidence these fans and vents as designed and installed were in all probability inadequate, yet had they been fully and diligently employed by the occupants, and in the full knowledge of their intended function and its importance, the process of ventilation might have been performed better than it was. But here one must assume that the air by some means or other could in fact enter from the corridors into the units, which the applicants' expert witness told us was no problem at all, but which we tend to question, and also that the heating devices operating on such newly-arriving air were functioning at all times - another circumstance we consider highly questionable. For it seems to the Tribunal highly possible, and we refrain from saying probable, that some ill-conceived impulse to save costs by not heating the air introduced into the corridors may have been operative here, and that the air in ther corridors was not only flat and immobile but also, in equal violation of the design concept, neither warm nor, therefore, absorptive.

The Tribunal holds that the whole system of ventilation in these units was a functional failure in practice if not a failure through design - and it opines that the design throughout these buildings was lamentable if not execrable - a fact which shall possibly be referred to herein again.

Adverting to the causes of condensation, whose effects, most horrendous in many of these premises, were so graphically described to the Tribunal by the unfortunate owner-occupants who appeared as witnesses, it is the opinion of the Tribunal based on what it has learned at this hearing and otherwise knows, that warm moist air will discharge its burden of liquid substance whenever it passes over or otherwise comes into close and intimate contact with some object the surface temperature of which has attained that temperature - invariably considerably lower than its own - known as the "dew point". The appreciation of this essentially simple principle of physics is the key to any understanding of the misery with which these people, whom the Tribunal would like to help, are afflicted. Moreover, the warmer the air, the greater its capacity to embrace and retain sometimes a very great volume of water. But once that water- or vapour-laden air touches the cold surface, then instantly out comes the percipitate, and the greater the size of the cold surface the more complete will be the evacuation of fluid from the fully-laden air. The point is reached when the air is so full of fluid that it simply has got to percipitate - and it will do so wherever it can.

In this case some percipitation has happened above the ceilings of the units in the plenum space. It has also occurred, however, and copiously, on the cold and expansive surfaces of the windows. It has also happened on the cold curbs forming the bases of the windows. The air is percipitating all over the space. The Tribunal holds that if it didn't happen above, in the plenum spaces against the spandral rails, whose insulating slabs of styrofoam have dropped away, it would be bound to happen somewhere else and that the abundance of fluid which has condensed upon the windows in such quantities would, as the result of insulating the spandrals, simply be augmented for that water, which must go somewhere, would have to go, in increased quantities, onto the windows.

In the view of the Tribunal the essential problem is that we have here a situation where too little air is saturated by too much moisture. It is a ventilation problem. It is a problem which resides in improper or inadequate air exchange and circulation. The air should not be permitted to percipitate in the areas inhabited by people or in areas above them. When it gets full of moisture it should be let out, and if it is not getting out what we are then faced with is not a problem of insulation, protecting this surface or that surface from becoming the situs of percipitation, but a problem of getting this moist air, air bursting with a liquid load, out of the living quarters before it makes a mess. In short, what is present here is a ventilation problem.

The Tribunal's function is not by any means that of a consultant engineer. Nor our duty is it to say how this difficulty should be solved. Ours is but to point the way. But to open up the ceilings and re-affix the slabs or sheets of styrofoam upon the plenum walls would, in the Tribunal's view, be no more than a poultice, symptomatic treatment. The causa causans - the true cause - of this problem is, as stated, lack of proper ventilation permitting a back-up of fluid in the air inside the units. The situation in the plenum space is a dependant issue - a causa sine quae non - one of several proximate causes of the trouble - not the true underlying cause. If it is otherwise, then the Applicant has failed to convince the Tribunal.

IN RESPECT OF ITEM (b), DETERIORATION OF CONCRETE CURBS FORMING BASES OF THE WINDOWS AND FAULTY INSULATION ALLOWING WATER PENETRATION, here again the problem is one of over-abundant, undischarged, moisture-laden air. The Tribunal is of the view that once the wet air is mixed with warm, dry air, as it ought on a regulat basis, and let out of the premises in a proper regular ongoing way through proper ventilation practices (and/or possibly mechanical dehumidification), this problem will also disappear. If it be otherwise the Appellant has again failed to convince the Tribunal.

IN RESPECT OF ITEM (c), DETERIORATING CONCRETE FORMING BASE OF BALCONY RAILINGS.

Here the Tribunal was first of all greatly concerned as to the possible existence of a safety problem - a hazard to the safety of persons standing on the balconies or leaning on the balcony railings or perhaps standing below on the ground beneath. It has heard the evidence and considered it. Over several months or years several chunks of masonry have dropped to the ground below. Were that ground a frequently used public passageway or some place where substantial numbers of persons were wont to congregate on reasonably frequent occasions then the hazard from dropping of pieces of masonry would be unacceptable. This does not appear to be the case however. The Tribunal has heard no evidence that any really substantial risk to the safety of persons rarely and accidentally situate beneath the balconies now exists or is likely to develop such as to justify the reconstruction of the balconies for safety sake. Neither are the railings likely to collapse in the foreseeable future, not upon the evidence. To the contrary they are said to be quite firm. Nor is there any serious allegation that the balconies themselves are about to drop to the ground, perhaps carrying to their varying destinations a throng of unready souls.

What we are left with is the contemplation of a collection of ugly, ill-designed and aesthetically unsatisfactory balconies and in particular balconies the surfaces of whose concrete railing bases are spalling - i.e., deteriorating aesthetically, superficially, but not functionally or to the extent that such balconies or their railings are unsafe. This is not the stuff of which Major Structural Defects are made. Air-entrained concrete was the problem we were told. The Tribunal was harangued for hours as to the importance of air-entrainment of concrete and as to its critical importance. But the issue is pointless. The Tribunal holds that there is not, nor has it been demonstrated as likely at any future time to be, in this area of the Appellant's claim, either a failure of a load-bearing portion of these buildings nor any adverse effect upon the intended use of the same, to wit, the use of any balcony - which is that of providing some place where people can sit out. An ugly balcony with spalling surface concrete is still a balcony for all that, upon which people can sit out and take the air and view the scene, however unappealing and disappointing it may be. Again this claim must fail.

For convenience' sake we shall reverse the order of dealing with the last two claim items coming therefore next to ITEM (e), CRACKING OF CONCRETE AND WATER PENETRATION THROUGH ROOF SLABS OF P1 AND P2 PARKING LEVELS.

This matter of the leaking underground garage, especially viewed against the Applicant's arguments in respect of some of the other complaints, is particularly interesting. In the matter of the spalling balcony sills, counsel for the Applicants devoted much of their lengthy argument to the proposition that the concrete used in these sills was non-air-entrained and that it therefore contravened the provisions of the Ontario Building Code and other Standards by which the construction of such things was governed. In the course of re-examination (as the Tribunal recollects,) counsel for the Applicant attempted to introduce the blueprints or building specifications relating to the balconies but failed as the Tribunal acceded to the objection of counsel for the Respondent that evidence fundamental to the Applicant's case should not be entered as "reply" evidence when it was not. Since it was not, the Applicant relied on the Ontario Building Code (as well as referentially upon the National Building Code of Canada and the standard of the American Society of Heating, Refrigerating and Air-Conditioning Engineers - the ASHRAE Standard) but the thrust of its argument was that since the specifications, (viz., the specifications of the code if not, as well, those set out in the building plans had not been met, the structure constructed was ipso facto faulty. As it turns

out all that was irrelevant to the Tribunal's finding for it has found (above) that the complaint in respect of the balcony railing related to a problem merely cosmetic and not affecting the safety of use of the balcony. But the point or thrust of the Applicant's argument persists and it seems that the Applicant has possibly laid a trap for itself by relying so heavily upon the provisions of the code or specifications.

The evidence before the Tribunal is that this underground garage was built in accordance with the very best standards or insights prevailing at that time - at the time it was built.

Mr. Pol had testified, and his evidence has not, in our view, been overthrown, that when this garage was designed and built, less was then known about the evil and corrosive effects of salt in solution in its long-term effects on reinforced concrete. Many such garages were built in the early 1970's which, in the after experience and observation of later years proved vulnerable to the effects of salt water penetration. And that is the case in the case of the Applicant. But is it a case of failure of materials? Is it a case of failure of workmanship?

These two questions are quite fascinating. They deserve close consideration.

There is no dispute that the underground garage was built in accordance with blueprints. Who drew the blueprints. Were they drawn by amateurs? No, they were drawn by qualified engineers, the best and most skilled professional technicians available to perform that function at that time. Later on, and upon the basis of observation of what had gone on in this and other similar projects in this particular climate and general atmospheric environment in which we live, here in Ontario, these and other engineers and technical specialists have or may have worked-out methods of meeting and overcoming the design problems which resulted in the terrible defects in this garage - the design problems which the builders of this garage failed to anticipate, provide for and overcome.

The users of this garage, which was built according to the best insights and perceptions available to the architects or designers at that time, which was built as well as anyone knew how to build an underground garage anywhere in Ontario in 1973, have had problems. The Applicant looks to the Ontario New Home Warranties Plan Act for relief. The program denies it. The Applicants look then to the Tribunal for relief, and the Tribunal looks to the Statute to see if the Statute provides it with the ability to help. The first thing the Tribunal notices

when reading the definition of "Major Structural Defect" is that it must be a defect in "materials or workmanship" producing certain adverse effects but if the materials supplied to a construction project are precisely those specified by an engineer, architect or other professional specialist who is licensed and professionally competent or at least as professionally competent as anyone at that time, and those materials conform to those specifications, how could the fault, if their performance under the test of time and environmental circumstances proves defective, be laid to the supplier or the supplier's insurer? Is there a failure of workmanship if the workman did his job precisely in accordance with the instructions of the professional designer? Could a patient sue a pharmacist if the medicine concocted by the pharmacist in accordance with the doctor's prescription failed to work? No, and the Tribunal holds that the same principle holds in the case of any alleged deficiency in workmanship or materials in the present case, for in each instance the materials and skills (workmanship) provided, have been provided in accordance with a supervening responsible authority (i.e. the physician or the professional designer of underground garages) which acquits the supplier of the goods or services so supplied of further responsibility for them (provided he has acted in good faith and in strict accordance with the order or specifications given him) as well as his insurer or anyone liable upon a warranty upon them.

We must look at the work "defect in materials or workmanship". "Deficient materials" are materials either inherently deficient for any use, or deficient for their ostensible use, or deficient for a use which the supplier ought to know they are likely to be put to and the word "supplier" is used in an extended meaning to include anyone who either "provides" or "supplies" the materials including a workman and "workmanship" includes the manner of supplying and application including the degree of competence and skill therein displayed. "Workmanship" includes "competence in designing" where the workman makes his own design but not where that function is pre-empted from him by a higher authority. The Tribunal does not hold that "workmanship" as used in the Act and its Regulations can include the professional services of an architect, engineer and other professional designer and would require further direction before taking it upon itself to do that. However, that is where it has decided that responsibility lies in this instance, to wit, with the professional designer of this structure and not elsewhere and again, therefore, this claim fails.

IN RESPECT OF ITEM (d), INADEQUATE FLASHING AND NO VAPOUR BARRIERS ON THE ROOF SYSTEMS EXTENDING EASTERLY AND WESTERLY FROM SECOND STOREY LEVEL OF HIGH-RISE.

Here again the absence of vapour barriers in the roof area was the consequence of a deliberate decision on the part of a professional designer or otherwise on the part of the professional designer of this structure and cannot be classified either as a defect in materials or workmanship warranted under this Act. This is also the case with the flashing.

In the view of the Tribunal the problems raised in this item (as with item [e] as well) is, at this stage, a problem of maintenance and therefore this claim also must fail.

Badly designed buildings will require more maintenance than well-designed ones. This has always been the case and always will be. This is why engineers and inventors are rewarded with prizes and high salaries for coming up with excellent designs. The work they do is important and when it is done badly discomfort and misery can result followed by the quest for compensation or indemnification by whatever source appears available. However, for the reasons stated herein, the Tribunal is unable to allow any of the items of the Applicant's claims and consequently is obliged to Order and Direct that they be and the same are now therefore entirely disallowed.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

REAL ESTATE AND BUSINESS BROKERS ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 431

IN THE MATTER OF an Appeal from the decision of the Registrar
of Real Estate and Business Brokers to refuse to renew
the registrations of the Applicants

CASTLE KEEP REAL ESTATE LIMITED
ALAN ROBINSON
JOHN WALTER
SYLVIA PERDUE
GLENN PERDUE
CHRISTOPHER BARNETT
WILLIAM BUNTING
FERDINAND OTAWA

Applicants

and

REGISTRAR UNDER THE REAL ESTATE AND BUSINESS BROKERS ACT

Respondent

BEFORE:

Matthew Sheard, Vice-Chairman as Chairman
Helen J. Morningstar, Member
W. J. Bingley, Member

AND IN THE MATTER OF a Decision and Order herein pursuant to
the Statutory Powers Procedure Act, Revised Statutes
of Ontario, Chapter 484, released February 9, 1982,

AND IN THE MATTER OF an application to clarify the said
Decision and Order to conform to the agreement, and
consent of the Parties hereto

AND UPON CONSENT OF THE Parties to the granting of the said
application

Clay Powell, representing Castle Keep Real Estate Limited, Alan Robinson, Sylvia Perdue and Glenn Perdue

Jerald W. MacKenzie, representing Christopher Barnett and William Bunting

J. Kelvin Ford, representing John Walter

A.N. Majaina, representing the Respondent

Now, pursuant to the authority of the Statutory Powers Procedure Act, the Tribunal doth amend the said Decision and Order as follows:

1. The Parties hereto waive compliance with the requirements of the Act.
- 2.a. Castle Keep Real Estate Limited to remain registered up till April 30, 1982, solely for the purpose of carrying out its past obligations and not for any other purposes.
- b. The registration of Castle Keep Real Estate Limited to be terminated effectively on April 30, 1982.
3. At the end of the suspension period of six months of the registration of Glenn Perdue and of Sylvia Perdue each may apply for registration as a salesman; and provided there is no derogatory record with respect to the conduct of Glenn Perdue and of Sylvia Perdue, the Registrar will grant registration to each of them.
4. The agreement hereto had been completed solely for the purpose of the Tribunal proceedings, commenced by the Registrar's Notice of Proposal of April 23, 1981, and such agreement and the Tribunal's Decision and Order based thereon shall not be used for any other purposes.

REAL ESTATE AND BUSINESS BROKERS ACT
REVISED STATUTES OF ONTARIO, CHAPTER 431

IN THE MATTER OF an Appeal from the decision of the Registrar
of Real Estate and Business Brokers to refuse to renew
the registrations of the Applicants

CASTLE KEEP REAL ESTATE LIMITED
ALAN ROBINSON
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Applicants

and

THE REGISTRAR UNDER THE REAL ESTATE AND BUSINESS BROKERS ACT

Respondent

BEFORE:

Matthew Sheard, Vice-Chairman as Chairman
Helen J. Morningstar, Member
W.J. Bingley, Member

Upon the matter coming before the Commercial Registration
Appeal Tribunal this 25th day of January, 1982, in the presence
of

Clay Powell, representing Castle Keep Real Estate
Limited, Alan Robinson, Sylvia Perdue and Glenn Perdue

Jerald W. MacKenzie, representing Christopher Barnett
and William Bunting

J. Kelvin Ford, representing John Walter

A.N. Majaina, representing the Respondent

DECISION AND ORDER

This matter coming on for a hearing today, January
25th, 1982 and upon hearing what was said by counsel for the

Registrar of Real Estate and Business Brokers and what was said by counsel for the applicants herein, the Tribunal orders and directs as follows:

1. The registration of Castle Keep Real Estate Limited shall be terminated effectively on April 30th next.
2. The registration of the applicant Alan Robinson shall be suspended for a period of one year commencing April 30th next. At the expiration of the said period of one year Mr. Robinson may apply for registration as a salesman and provided that there is no derogatory record with respect to the conduct of Mr. Robinson the Registrar will grant him registration as a salesman but at no future time shall the Registrar grant Mr. Robinson registration as a broker.
3. The registration of the applicant John Walter shall be suspended for a period of one year commencing March 31st, 1982. At the expiration of the said period of one year Mr. Walter may apply for registration as a salesman and provided there is no derogatory record with respect to the conduct of Mr. Walter, the Registrar will grant him registration as a salesman. At the expiration of a further period of one year, i.e. at the end of a second year running consecutively to the first year, Mr. Walter may apply for registration as a broker and provided there is no derogatory record with respect to his record covering this latter period as well, the Registrar will grant registration as a real estate broker.
4. With respect to the applicant Glenn Perdue it is ordered that his registration as a salesperson shall be suspended for a period of six months commencing January 25th, 1982 such suspension to run until July 26th next. At the end of that time Mr. Perdue may apply for registration as a salesman and the Registrar will grant him such registration.
5. With respect to the applicant Mrs. Sylvia Perdue, it is ordered that her registration be suspended for a period of six months commencing July 27th next and running to January 24th 1983. At the end of that time Mrs. Perdue may apply for registration as a salesman and the Registrar will grant her such registration.

6. With respect to the applicant William Bunting, it is ordered that his registration as a real estate salesman shall be suspended for sixty days commencing February 1st, 1982. At the end of that time Mr. Bunting may apply for registration as a salesman and provided there is no derogatory record with respect to his conduct the Registrar will grant him registration as a salesman.

7. With respect to the applicant Christopher Barnett, it is ordered that his registration be suspended for a period of thirty days commencing February 1st, 1982. At the end of that time Mr. Barnett may apply for registration as a salesman and provided there is no derogatory record with respect to his conduct the Registrar will grant him registration as a salesman.

LYLE COLLARD

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO RENEW THE REGISTRATION OF THE
APPLICANT AS A REAL ESTATE SALESMAN

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
H. SINGER, MEMBER
J. JUSTIN, MEMBER

COUNSEL: LYLE MORRIS COLLARD, appearing in person
A.N. MAJAINA, representing the Respondent

HEARING

DATE: March 3, 1982

REASONS FOR DECISION AND ORDER

The Applicant Lyle Collard appealed from the Proposal of the Registrar of Real Estate and Business Brokers to refuse to renew his registration as a registered real estate salesman. This Proposal was based on three principal reasons as set forth in paragraph 4 of the Notice of Proposal:

1. Having regard to his financial position, Collard cannot reasonably be expected to be financially responsible in the conduct of his business.
2. The past conduct of Collard affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.
3. Collard is carrying on activities that are or will be, if his registration is continued or renewed, in contravention of the Act or its Regulations.

These reasons for refusing registration were supported by a substantial quantity of allegations also set forth in the Notice of Proposal.

The Applicant appeared at the Hearing which he had requested but without counsel. Shortly after taking the stand and having been placed under oath and notwithstanding the efforts of the Tribunal and of counsel for the Registrar to ensure complete fairness to him and to protect him from self-incrimination, he agreed that most of the allegations against him and concerning his alleged misconduct were substantially true and accurate. By way of evidence to prove these allegations counsel for the Registrar called one witness only, the Compliance Officer, Mr. Dougan. The Applicant Collard did not choose to cross-examine Mr. Dougan and admitted that the bulk or all his testimony was true. Consequently the Tribunal will review the evidence in respect of the Proposal in a summary manner.

The Registrar's first item of complaint against the Applicant, the first reason for the Proposal, namely that "having regard to his financial position, Collard cannot reasonably be expected to be financially responsible in the conduct of his business", was supported by Exhibit 7, a Sheriff's Certificate issued on August 4th, 1981 by Arthur G. Schmidt, Sheriff of the Judicial District of Waterloo, disclosing writs of execution in his hands against the lands and tenements of Lyle Morris Collard being eight in number and to the approximate aggregate of the sum of \$28,000.00 or \$29,000.00. It should be remembered at this point the application for registration in question was dated April 9, 1981 and that all of these judgements referred to in the abstract of writs of execution were outstanding and in the hands of the Sheriff at that time. The existence of these writs of execution in the hands of the Sheriff is accepted by the Tribunal in the absence of any evidence tending conversely as conclusive grounds in support of the Registrar's first allegation and reason for his proposed revocation namely that the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business.

The Applicant's application for renewal of his registration as a registered real estate salesman (being Exhibit 11) failed to disclose these judgements against him. At the Hearing he failed to adequately explain this non-disclosure.

There was further evidence that the Applicant had knowingly carried on business under the name and style of Col-Robin Investments Limited which included entering into contracts for the conveyance of real property in that name and style when such ostensible company was not registered and the Tribunal accepts that allegation as proven as well.

In consequence of these facts which the Tribunal finds to have been proven, it is held that the past conduct of Collard affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Finally, and in regard to sub-paragraph 3 of paragraph 4 of the Registrar's Notice of Proposal which is the Registrar's third and last item of complaint, the Tribunal heard evidence that the Applicant was in breach of Section 42 of the Real Estate and Business Brokers Act in that he did, on at least one occasion, give or provide, pursuant to his obligation under the section, a Statement of Disclosure which was grossly inadequate and effectively deceptive, which said evidence the Tribunal accepts.

For these Reasons alone, and there was further and other evidence of misconduct in considerable abundance, and taking into consideration the Applicant's acquiescence in the charges against him, the Tribunal confirms the Registrar's aforementioned Proposal and Orders and Directs that it be implemented forthwith, that is to say the Tribunal Directs that the Applicant's application for renewal of his registration as a real estate salesman be refused.

REAL ESTATE AND BUSINESS BROKERS ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 431

IN THE MATTER of the REGISTRATION of
ANGELO GENTILE
as Real Estate Salesman

AND IN THE MATTER OF the PROPOSAL of
the Registrar of Real Estate and Business Brokers
made pursuant to section 9(1) of the
Real Estate and Business Brokers Act
TO SUSPEND THE REGISTRATION
- Proposal dated: 9th day of July, 1981

AND IN THE MATTER OF a Requirement for a hearing respecting
the said Proposal pursuant to Section 9(2).
- Requirement dated: 20th day of July, 1981

AND IN THE MATTER OF a Decision and Order of the Tribunal under
Section 9(4) directing the Registrar to carry out his
Proposal
- Decision and Order released: 30th day of August, 1982

AND IN THE MATTER OF the Notice of Appeal from the Decision
and Order.
- Notice dated: 25th day of October, 1982, by

ANGELO GENTILE

Applicant

AND

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

STAY

Upon request of the Applicant for a Stay of the Order, and
consent thereto by the Respondent

NOW Pursuant to Section 9(9) of the Real Estate and Business
Brokers Act, the Commercial Registration Appeal Tribunal
does grant a Stay of the Order until disposition of the
Appeal.

ANGELO GENTILE

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF REAL
ESTATE AND BUSINESS BROKERS

TO SUSPEND REGISTRATION AS A REAL
ESTATE SALESMAN

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
W. J. BINGLEY, MEMBER

COUNSEL: ENIO ZEPPIERI, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING

DATE: JUNE 7th, 1982

REASONS FOR DECISION AND ORDER

This was an appeal by the Applicant Angelo Gentile from the Proposal of the Registrar of Real Estate and Business Brokers to suspend the registration as a real estate salesman of Angelo Gentile for a period of six months pursuant to section 8 of the Real Estate and Business Brokers Act, R.S.O. 1970, ch. 401 (now R.S.O. 1980 ch. 431) which said proposal was communicated to the Applicant by a Notice of Proposal dated July 9th, 1981 and which particularly alleged as follows:

1. Gentile has been employed as a real estate salesman at all material times by Tri-Gold Realty Limited, 1000 Finch Avenue West, Downsview, Ontario.
2. On the 29th day of October, 1980 Michael Law entered into a listing agreement with Tri-Gold Realty Limited respecting property known as 67 Kingsdale Avenue, City of North York. The listing price was \$86,500.
3. Gentile offered to Victor Goldman, a real estate salesman employed by Del Realty Inc., the opportunity to present offers on the subject property.
4. Goldman did obtain an offer to purchase the subject property from one Mr. Benton at a purchase price of \$89,000. The offer to purchase was dated November 3, 1980.

5. Goldman advised Gentile of the Benton offer. However, Gentile advised Goldman that the property was being offered on a first refusal basis to another person and failed to present the offer to purchase to the vendor (Law) and did not advise him of the existence of the offer to purchase.
6. On or about the 4th day of November, 1980, Gentile presented the vendor with an offer to purchase from one Lorne Kelly for a purchase price of \$84,000.
7. Gentile advised the vendor that the offer was fair and reasonable and the vendor accepted the offer while remaining unaware of the existence of the other offer for a greater amount.

Upon due consideration of the evidence which was set before it at the Hearing, the Tribunal finds that the facts of the case are essentially as alleged in the said Notice of Proposal and that the Tribunal makes this finding of fact notwithstanding that there was some conflict in the evidence of various of the witnesses, notably that of the said Victor Goldman and that of the Applicant who denied that the Benton offer was communicated to him (i.e. "registered" with him). The Tribunal finds that Mr. Benton's offer was a good and valid one notwithstanding that it contained one rather "elastic" condition, namely that it was subject to the offeror inspecting and approving the house (he hadn't been through it) and that Gentile, whom we find did receive notification from Goldman of the offer as alleged, was in fact in breach of his duty to his client Michael Law, arising from the listing agreement referred to, in failing to ensure (or taking such steps as were in his power to ensure) that such offer was communicated to Dr. Law for his due consideration as vendor of the subject property.

The Applicant's fault is aggravated by the evident fact that he (and/or his firm) received a greater commission as a result of what transpired while the vendor received a much lower sum by way of proceeds of the sale; had the Benton offer been duly presented to the vendor and accepted by him Gentile (and/or his firm) would have received a considerably lesser net commission and the vendor a considerably higher amount by way of proceeds of the sale (viz., \$5,000 more). Thus it appears that the Applicant put his own pecuniary interest ahead of his client's, sacrificing the latter in order to ensure the former.

This is precisely what a registered real estate salesman or broker must never do. It is a gross and fundamental breach of the fiduciary relationship existing between agent and principal and exemplifies the worst kind of treachery a registrant in this

industry can visit upon a member of the public.

The Tribunal finds that the registrar is well-justified in proposing to set an example in this very serious case of the abuse of the privilege and confidence implicit in the grant of registration and notwithstanding that restitution of the said sum of \$5,000 may or may not have been made to the vendor after he had become aware of this injury perpetrated upon him the Tribunal holds that a suspension of the Applicant's registration for the period of six months is fully in order. The Tribunal accordingly Directs the Registrar to implement his Proposal forthwith; that is to say, the Tribunal Orders that the registration of Angelo Gentile as a real estate salesman shall be suspended for the period of six months immediately following the date of this Order. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

GOHEEN REALTY AND INSURANCE LIMITED and
ALLAN RAYMOND GOHEEN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO RENEW THE REGISTRATIONS OF
THE APPLICANTS.

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
W.W. EVANS, MEMBER
W. J. BINGLEY, MEMBER

COUNSEL: ROBERT D. PECK, representing the Applicant
A.N. MAJAINA, representing the Respondent

HEARING

DATES: March 15, 16, 17, 18, 19, 22, 23, 25
July 5, 6, 9, 19, 28

REASONS FOR DECISION AND ORDER

On the 27th day of July, 1981 the Registrar of Real Estate and Business Brokers issued a Notice of Proposal which was duly served upon the Applicants. The proposal was made pursuant to Sections 6 and 8(2) of the Real Estate and Business Brokers Act R.S.O. 1970, ch. 401 as amended and the regulations made thereunder and subject to S.9 of the Act (which provides for an appeal to the Tribunal) it was a proposal that the Registrar refuse to renew the registration of the Applicants under the said Act upon the following grounds:

ALLEGED REASON OR REASONS FOR THE REGISTRAR'S
PROPOSAL, AS REQUIRED BY SECTION 9(1) OF
THE ACT

(a) Having regard to his financial position, Goheen cannot reasonably be expected to be financially responsible in the conduct of his business, within the meaning and contemplation of section 6(1)(a) of the Act; or

(b) Goheen Limited is a corporation and, having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, within the meaning and contemplation of section 6(1)(c)(i) of the Act; or

(c) The past conduct of Goheen affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of section 6(1)(b) of the Act; or

(d) Goheen Limited is a corporation and the past conduct of its officer and director, namely, of Goheen, affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, within the meaning and contemplation of section 6(1)(c)(ii) of the Act; or

(e) Goheen Limited or Goheen, or both of them, is or are carrying on activities that are, or will be, if registration is renewed or continued, in contravention of the Act or the regulations, within the meaning and contemplation of section 6(1)(d) of the Act.

These grounds upon which the Registrar was proposing to terminate registration coincided with the provisions of Section 6(1) of the Act which reads as follows:

6.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

(i) having regard to its financial position it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

In perusing the portions of Section 6 quoted above the reader will note the word "or" which appears recurrently and realize that any one of the objectionable situations or circumstances which are detailed therein will, if proven, be sufficient to have a fatal effect upon either an application for registration or renewal thereof.

The said Notice of Proposal further reads in part (at p.7) as follows:

AND TAKE FURTHER NOTICE THAT:

6. On December 12, 1980, the Ontario Securities Commission (OSC) made an investigation order pursuant to section 11(2) of The Securities Act, 1978, S.O. 1978, c.47, as amended, (The Securities Act), directing an investigation into the affairs, dealings and activities of and between Allan R. Goheen, Allan R. Goheen Mortgage Fund, Goheen Realty and Insurance Limited and Comad Investments Limited.

The investigation was commenced as a result of an inquiry on December 11, 1980 from a solicitor representing the Fellowship of Evangelical Baptist Churches in Canada. "The Baptist Pension Fund" of this Solicitor's client had invested \$225,500.00 in the Goheen Mortgage Fund and it had not received interest payments which were due on September 30, 1980. It was this fact which had prompted the solicitor's inquiry.

The OSC investigators discovered that Goheen is the owner and president of Goheen Real Estate and Insurance Limited, which is registered as a real estate broker under the Act. According to Goheen, he has quite a few clients who, after selling a property, have money which they wish to invest in mortgages. They would often ask him to find a suitable mortgage for them to invest in. Some time around 1970, Goheen decided that it would be easier to "pool" the money given to him to invest in mortgages. This method would also have the advantage of spreading the risk of a mortgage going bad among all the investors.

The arrangement between Goheen and the investors was set out in a certificate, styled "Investment Agreement - Allan R. Goheen Mortgage Fund" (the Certificate or Agreement) which was accompanied with a two-page form letter containing Regulations (the Letter), which bears the date of September 19, 1978 and which, on the letterhead of the Goheen Mortgage Fund, is a promotional Letter.

Under the Goheen Mortgage Fund Agreement, the Investor appoints Goheen as "the Trustee to invest along with other funds in mortgages", an amount of such investment specified therein. Among other things, it states further: "This is a private fund, not under Government Supervision....The Trustee may alter any of the procedures in the attached Regulations at any time by giving written notice to the Investor. The Trustee shall provide diligent, efficient management of the fund at all times, but shall not be held liable for an error of judgment or omission provided that he acts in good faith....". Goheen signed the Certificate or Agreement as Trustee.

The Investment Agreement - Allan R. Goheen Mortgage Fund and the promotional Form Letter are attached hereto and form a part of this Notice of Proposal.

On April 1st, 1981, the Ontario Securities Commission made the following Order:

IN THE MATTER OF THE SECURITIES ACT, 1978,
S.O. 1978, CHAPTER 47, AND AMENDMENTS THERETO

AND

IN THE MATTER OF ALLAN R. GOHEEN AND THE
ALLAN R. GOHEEN MORTGAGE FUND

O R D E R
(Section 123)

WHEREAS on February 6, 1981, the Ontario Securities Commission made a Temporary Order pursuant to Section 123(3) of the Securities Act, 1978, S.O. 1978, c.47, as amended (the "Act") that all trading shall cease in respect of the securities issued by or to be issued by Allan R. Goheen ("Goheen") or any Company controlled by Goheen or any partnership, unincorporated syndicate, unincorporated organization,

unincorporated association, trust or estate of which he is in a position to affect materially control including, without limiting the foregoing, the Allan R. Goheen Mortgage Fund (the "Fund"), for fifteen days;

AND WHEREAS on February 19, 1981, the said Order was extended upon consent until March 31, 1981;

AND WHEREAS by Notice dated February 25, 1981 Goheen and the Fund were advised of a hearing to be held on March 19, 1981 to consider extending or varying the said Temporary Order;

AND WHEREAS on March 19, 1981, the said Temporary Order was continued and the said hearing was adjourned sine die;

AND UPON the consent of counsel for Goheen and the Fund that the said Temporary Order be continued and made permanent;

IT IS ORDERED pursuant to the provisions of Section 123 of the Act that the said Temporary Order is continued and made permanent.

Subsequently, on the 7th of May, 1981 the Ontario Securities Commission delivered Reasons for its above-quoted Order of April 1st, 1981 which read as follows:

IN THE MATTER OF THE SECURITIES ACT

AND

IN THE MATTER OF ALLAN RAYMOND GOHEEN

Hearing: April 1, 1981

Present:

Henry J. Knowles, Q.C.	- Chairman
Harry S. Bray, Q.C.	- Vice-Chairman
William A. Simonton, F.C.A.	- Commissioner
Stuart Thom, Q.C.	- Commissioner

Robert D. Peck	- Counsel to Allan Raymond Goheen
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Paul G. Findlay	- Staff Counsel
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This hearing was convened under section 124 of the Securities Act, 1978, S.O. 1978, c.47, as amended (the "Act") for the purpose of considering whether it was in the public interest to deny to Allan Raymond Goheen ("Goheen") the exemption in section 43(2)5 of the Act, which permits trading in mortgages without registration under the Act by persons or companies registered or exempted from registration under the Mortgage Brokers Act, R.S.O. 1970, c. 278. Under section 4(4) of the Mortgage Brokers Act every person registered as a "real estate broker" under the Real Estate and Business Brokers Act, R.S.O. 1970, c. 401, is deemed to be registered as a "mortgage broker" so long as he holds registration as a "real estate broker". Goheen and a company he controls, Goheen Realty & Insurance Limited ("Realty"), holds registration under the latter Statute as well as the Insurance Act, R.S.O. 1970, c. 224.

Under section 5 of the Mortgage Brokers Act "financial responsibility" or "record of past conduct" are matters that may be considered in the context of whether it is in the public interest to grant or continue registration. In determining if it was in the public interest to withdraw the exemption in section 34(2)5 of the Act, the Commission applied a similar standard in concluding that the exemption should be withdrawn, not only from Goheen personally, but from any person or company of which he is an officer, director, member or shareholder including Realty, Yonge-Rosedale Developments Ltd., Covic Holdings Limited and Mudo Investments Ltd., all companies in which Goheen or his associates have a direct or indirect interest, providing that so long as Goheen holds registration as a "real estate broker", he will be permitted to arrange mortgages for clients through the financial institutions set out in section 34(1)3(i), (ii) and (iii) of the Act, that is banks, loan and trust companies and insurance companies. We brought our concerns as to Goheen's suitability for continued registration to those directly responsible for the administration of the sister agencies with oversight over the registration of "real estate brokers" and "insurance brokers". What follows is the basis for our opinion.

For a period of nearly twenty years, Goheen has been accepting money from friends and acquaintances for investment. Most recently he has received these

funds in the name of the Allan R. Goheen Mortgage Fund (the "Fund") entering into a form of agreement with the investor, styled "Investment Agreement" (Exhibit C.1). Under this investment contract Goheen is the "Trustee" and the Investor "appoints the Trustee to invest along with other funds in mortgages the amount" invested. The trustee is given the widest latitude, subject to the statement of purpose above. The investor also receives a two page document (the "Letter") describing the Fund and its objectives. (Exhibit C.2). The letter also describes how interest is computed and the payments to be made to Goheen as manager of the Fund. The Letter first sets out the purpose of the Fund in the following terms.

"These are private funds of A.R. Goheen and his associates. They are invested in equities in Real Estate, which are expected to produce a high yield as well as be secure. Management of the fund is provided by A.R. Goheen and may be contracted to Goheen Realty Limited."

After noting that investments may be made in multiples of \$1,000.00 (to a maximum of \$50,000, except by special arrangement) which "may be withdrawn any time upon ninety days' notice" the document continues,

"Interest is paid on each deposit as follows: Simple interest is calculated monthly on the principal account at the rate of eight percent (8%) per annum and credited to interest accounts where it is accrued until the end of each fiscal year, June 30th. The net earnings of the Fund are then calculated, and fifty percent (50%) of these are also credited as interest to the interest accounts....Payments will then be made for the total amount in each interest account by September 30th each year." (The other 50% of net earnings is paid to Goheen as manager.)

Later the Letter notes, under the heading:

"Assets, Banking and Liabilities",
 Mortgages will be assets of A. R. Goheen in Trust, and will be so registered. Borrowings from the Bank may be added to the funds on deposit from time to time to temporarily finance purchases of mortgages..."

The Letter states the investment policy of the Fund,

"Investments are to be made primarily through the purchase of second mortgages at discount in the Metropolitan Toronto and Oshawa Districts. Earnings will be realized through interest at the current rates, discounts and the re-investment of payments as they are received.

Changes may be made in these procedures or in the interest rates used for calculating credits to the interest accounts from time to time at the discretion of A. R. Goheen. These may be necessitated by alteration in the current interest rates being paid on mortgages, or by other causes, such as Government regulation. In the case of a change in interest rates, one hundred and twenty (120) days' notice will be mailed to each (investor)."

To emphasize the nature of the investment, and the risk the investor is being asked to assume the Letter concludes,

"Advantages include provision of management in the selection of mortgage investments, screening of mortgagors, collection of payments and accounting of profits. Risk is minimized through expert management and spread over many mortgage investments; and yet a substantial share of the profit is realized by each associate. Finally, liquidity is provided in that, should cash be required for any purpose, deposits may be withdrawn upon ninety days' written notice."

The commission staff became aware of the existence of the Fund as a result of enquiries made of them on behalf of the Fellowship Baptist Pension Fund in December, 1980. From this information there appeared to be unlawful trading in unqualified securities, a form of investment contract represented by the Fund certificates. (It was admitted by Goheen for the purposes of this hearing that he had been distributing these securities unlawfully, without obtaining the registration required by the Act and without filing a prospectus.) On December 12, 1980, the Commission instructed that an investigation be conducted pursuant to section 11 of the Act and, as the result of the facts determined to that point in time indicating a short fall in the assets required to repay investors, including the September 30, 1980, interest payments, the Commission instructed that an application be brought in the Supreme Court of Ontario under section 17 of the Act for an order appointing Touche Ross Limited as receiver and manager of the Fund (the "Receiver"). The interim appointment by the Court of the Receiver on February 16 was confirmed by the Court on March 2, 1981.

The Receiver prepared an initial report dated March 16, 1981 (the "Report"). On the basis of (1) the apparent mismanagement and misconduct evidenced by that Report, and (2) the terms of the Certificate and Letter, the Commission concluded that it was in the public interest to restrict the scope of Goheen's activities, and that any delay would be prejudicial to the public interest. Ex parte orders were issued on March 19, 1981, under sections 123 and 124 of the Act, firstly, prohibiting Goheen from trading further in Fund securities and, secondly, prohibiting Goheen from trading in mortgages by withdrawing from Goheen the exemption contained in section 34 (2)5 of the Act. This hearing was convened for the purpose of determining whether the section 124 order should be continued, varied or withdrawn.

During the course of this hearing, it was conceded by Goheen that he had traded unlawfully in the investment contracts represented by the Fund certificates. He did not hold registration as required under the Act. He distributed the securities without attempting to file the required prospectuses. Goheen waived notice of hearing and the cease trading order issued under section 123 directed to Goheen's dealings in Fund securities was made permanent.

In addition to the Report, elaborated on through the evidence of Stephen Lewis Doschalk, C.A., its author, an agreed Statement of Facts was entered into evidence which included additional comments and explanations were made on behalf of Goheen concerning the Report and the Statement of Facts. Finally, we heard the sworn evidence of Goheen. The evidence of misconduct and unfair dealing was confirmed.

As detailed above, Goheen held himself out as receiving the funds in trust with the Certificate stating the funds were to be invested in mortgages. The Letter adds that investments will be made primarily in second mortgages. Without extensive investigation it would be difficult to establish the details of how the funds furnished by investors were used by Goheen. On the explanations offered to date by Goheen, those indicated in the Report and those given before us, any accounting for the Funds made by Goheen was arbitrary and subject to the exigencies of the moment. None of the alleged Fund assets, the mortgages allocated in Goheen's accounting to the Fund, are registered in the Fund name as stipulated in the Letter. The mortgages, some 16 on the Receiver's list, are all in Goheen's name with no indication on their face that the Fund has any interest in them. They were traced through Goheen's records. The mortgages represent receivables of \$449,941.65, with one unregistered mortgage from a J.J. Zurba, his brother-in-law, executed by Goheen under a power of attorney in his own favour, amounting to \$248,238.02 of this total. A third mortgage listed as representing \$13,170.25 was due in 1978, and is of little value since the first mortgagee has sold the property without any surplus for the third mortgagee with one of the two mortgages being bankrupt.

Goheen has made other allocations. Under the heading "Other Loans Receivable" the Receiver dealt with three of these. They total \$89,885.96. Of this sum \$69,815.35 is said to be owed by a J.E. and G.E. Clemenger with Goheen having waived interest payments and agreeing to accept \$250 per month, an amount which would not cover the interest. \$19,609.44 is shown as a loan to Allan R. Goheen/Rev. & Mrs. Pequengnat. This loan, it was explained, was made to enable Goheen to purchase a property, registered in Goheen's name and occupied by the Rev. and Mrs. Pequengnat. Mr. Pequengnat, we understand, was a some time trustee of the Fellowship Baptist Pension Fund and salesman for Realty. The balance of \$461.17 is represented by a promissory note on which no payments have been recorded since July, 1976.

The Fund is said to have an equity interest in two parcels of real estate to which the Receiver assigned a net value of \$16,806 in the Statement of the Fund's Affairs forming part of the Report. Titles to these properties have not been examined.

The 66 recorded investors have principal amounting to \$720,214.56 in the Fund and, as at February 15, 1981, were owed \$78,317.72 in interest calculated at 8% on their investment. The largest investor by far is the Fellowship Baptist Pension Fund whose principal is recorded as \$225,500. Goheen disputes the interest figure of \$78,317.72 calculated by the Receiver as described above stating that no interest is payable unless the Fund earns money. He feels that the current liability for interest, calculated as at June 30, 1980, and payable on September 30, remaining unpaid as at the latter date, was \$41,174.54. It is also his evidence, with a variety of explanations, that the security assigned is adequate.

The Notes to the Statement of Affairs forming part of the Report show that the Fund now holds \$195,000 in term deposits with a bank. The source of these funds is described in the following note,

"Developments during the period February, 1981, to March 16, 1981 -
- during the period of the Receivership a mortgage due from Yonge-Rosedale Developments Limited was repaid.

Part of the proceeds were used to repay the Bank of Nova Scotia for a term loan secured on this mortgage. The net proceeds passing to the Fund were \$199,682.11. Other than this the Receiver has collected monthly mortgage and loan payments and kept mortgages payable current."

This led the Commission to an examination of what proved to be a series of questionable transactions. Yonge-Rosedale Developments Limited ("Y.R.") is a company in which Goheen has a 25% equity interest. It was formed for the purpose of developing a property on Yonge Street to provide, among other things, for the housing of senior citizens. This project has now commenced to move ahead after several set backs. Y.R. is retaining the ground floor commercial development while control of the senior citizens' accommodation located above is being assigned to

a Baptist organization under a 99-year lease. While the repayment may have come from Y.R. representing money it received indirectly from Fund investors throughout the year, on Goheen's evidence the money had been passed through Realty.

The Y.R. project, according to Goheen's explanation, goes back to 1974 when the property was acquired by Y.R. with the Fund advancing \$120,000 initially. There was a first mortgage back to the vendor of the property for \$840,000. The project did not move forward immediately because of the City of Toronto's policy aimed at restricting development. The rents from existing tenants were insufficient to meet the obligations and Goheen had to find funds to fend off foreclosure and to pay taxes. In all, Goheen stated, some \$306,000 was borrowed by Y.R. from the Fund. This money appears to have been loaned through Realty to Y.R. The recent advances enabled Y.R. to repay the money advanced. On Goheen's evidence the Fund had to look to him and Realty for repayment. At first Goheen stated he mortgaged his home to secure the loans to Realty. Later, when the loans became too large, Goheen used a power of attorney to execute a mortgage on the Zurba property to protect the loans through Realty to Y.R. It is clear that Goheen put his Fund holders' money at risk to protect his personal interest in the Y.R. project under very questionable circumstances. The real security in the Zurba property is in question. It is undeveloped land which produces no income. The mortgage was not registered.

Goheen seemed to have little, if any, appreciation of his responsibility as trustee under the agreement to the investors who trusted him to manage their money. He cloaks his stewardship in an ostentatious mantle of personal integrity at the same time apparently not recognizing the implications of diverting and appropriating these trust funds for his own benefit, particularly through Realty to the Y.R. project. He failed to exercise ordinary integrity, prudence and judgement in his stewardship of the investors' funds.

It is our belief, on the evidence before us, that Goheen did not manage the Fund with probity and in the best interest of its investors. One might have expected standards higher than the bare minimum against which he fell short since he states that he had particular and special relationships with many of the investors including

those relying on the Pension Fund.

DATED at Toronto this 7th day of May, 1981.

"Henry J. Knowles"

"Harry S. Bray"

"Stuart Thom"

"W. A. Simonton"

The penultimate sentence of the second paragraph of the O.S.C.'s foregoing reasons merit a second look:

We brought our concerns as to Goheen's suitability for continued registration to those directly responsible for the administration of the sister agencies with oversight over the registration of "Real Estate Brokers" and "Insurance Brokers".

So, in the Tribunal's opinion, do the last three paragraphs - in particular.

The existence of the foregoing order of the O.S.C. and the Reasons for it also set out above were matters of fact and of public record prior to and at the time of the Registrar's Proposal, from which the Hearing before this Tribunal was an appeal. The Hearing before this Tribunal went on for thirteen days. It would be hard to imagine how anyone could say that it was anything but a full and complete review of the evidence or that anything that could possibly be said either for or against the Applicants, touching the issues raised in the Proposal, had been left unspoken during those lengthy days. But at the end, the Tribunal was left with the impression that the facts, as synopsised in the O.S.C. Reasons, and the general conclusions reached therein, were substantially accurate and constituted a decent statement of the case, much in line with the impression left with the Tribunal after all it had read and heard.

The nature and character of Allan R. Goheen remained to the Tribunal largely an enigma. We cannot assess him as a person. He appears to be honest and upright beyond the standards set by the average person. An impressive group of witnesses described him in terms of great admiration and esteem; glowing references were made to his kindness and charity, his willingness to help others, and we were told as well of the great importance of religion in his life. Substance is given to the favourable character evidence by the fact that he and Mrs. Goheen are

the adoptive parents of four children for whom we are sure they are providing a good home. All this impressed the Tribunal very favourably. One witness, Mrs. Velma Jane Scorgie said her husband and she had known him for over 30 years, since the 1940's. They had given him \$10,000 in 1972 to start with because she knew him to be an honest man and at present she has some \$27,550. in the fund and isn't worried because she still trusts him. When asked if she knew some of the investments were made in his name, not in the name of the fund or in his name as trustee she replied that "if they were in his name it was just as good as in trust" to her. And in the Tribunal's view that was pretty much the way Mr. Goheen saw things too.

Mr. McIlldoon, another witness, was the administrator of New Horizons Tower, a Senior Citizens Home operated by the Baptist Fellowship, and has an interest in Harwin Mission Supplies. He also was an investor but he got his money out (with interest) just when the problems were beginning. Harwin Mission Supplies still has \$5,000 invested and Mr. McIlldoon is hopeful that these funds will be recovered. It is the opinion of Mr. McIlldoon that Mr. Goheen is an honest man and that "things would have turned out better if the Receiver had not been called in". Mr. McIlldoon met Mr. Goheen through the church. Asked in cross-examination if he knew what "breach of fiduciary duty" means he replied, disarmingly, that it was "not a term I use every day" but that someone had told him yesterday. At the conclusion of his evidence in chief he said he still knew Mr. Goheen to be an honest man.

Some of the other witnesses called by the Applicants had a high opinion of Mr. Goheen but Mrs. Scorgie and Mr. McIlldoon were the only such ones who had given him money to invest. Mr. W.F. Wilkie is 67 years of age, a retired businessman, and in 1967 was president of the Baptist Evangelical Fellowship of Canada (i.e. - approximately ranking with a "moderator" or a "primate") and is now president of the Yonge-Rosedale Charitable Foundation which will operate the Senior Citizens Home situated in the Yonge-Rosedale development. His opinion, having dealt with people widely throughout his career and having been involved with staff selection for many years, was that Mr. Goheen was "honest, honourable and above reproach". When asked in cross-examination what he concluded after reading the Touche-Ross report he said he had concluded that some of Mr. Goheen's investments may have been "imprudent". When then asked what fiduciary duty means he gave an excellent definition. When asked by a Member of the Tribunal, Mr. Evans, if he had been in favour of putting

the Pension Fund's money into Goheen's hands he replied without further elaboration that he had other plans for the investment of the money which had been over-ruled. Mr. Wilkie had given Mr. Goheen no moneys of his own to invest.

Mr. Tony Rider, a realtor and former employee of Mr. Goheen's, and member of the same church, had volunteered to give evidence on his behalf and told the Tribunal that Mr. Goheen's name was known and respected in Christian circles and that he had "the highest integrity of anyone I know in the real estate business" and was sure others shared the same view. Although he had not invested moneys of his own in Goheen's fund, having his own sources of investment, he was sure Goheen was very conservative in the way he let out Mortgage Fund moneys. Sales meetings, when he was employed by Mr. Goheen, commenced with prayers. Mr. Rider also told the Tribunal of Goheen's Bible Camp near Belleville or Prince Edward County. Mr. Rider impressed the Tribunal as a decent and honest man.

Mr. Ian Griffiths, a Scottish solicitor who is now a registered Real Estate Broker in Ontario operating his own brokerage firm, has been teaching courses in mortgage financing at Ryerson Polytechnical Institute and at George Brown and Seneca Colleges. He testified, as a former salesman employed by Mr. Goheen, that Goheen, like himself, was well-familiar with the law relating to the real estate and mortgage industries in Ontario. He recalled that Goheen would often say "no, you cannot do that, it is contrary to the Real Estate and Business Brokers Act... etc.". Mr. Griffiths also teaches for the Real Estate and Business Brokers Act qualifying examination and had the impression that Mr. Goheen, like himself, knew a lot about the Regulations governing the real estate industry. Asked if he was ever an investor in the Goheen Mortgage Fund he replied "No - I never knew it existed".

David Norton, Goheen's accountant, was simple and explicit in his opinion of him. "No question about it - he's a completely honest, fine business man... Never anything that smacked of dishonesty - only generosity. I've never seen a person who's done so much to help so many people get established ..."

It was not until the ninth day of the Hearing, on July 5th, that the Tribunal made the acquaintance of Mr. William Edward Tomlinson.

Mr. Tomlinson was in his 70th year, was an investor in the Allan R. Goheen Mortgage Fund and was called as a witness not by the Applicants but by the Registrar. He had something of the air about him of vengeance. His evidence was that for three years he had worked for Goheen as a salesman and often went to Goheen's church. When asked how did he know about the Mortgage Fund, he replied that "Goheen made it clear that the fund existed and indicated that it would be a good place for some of my money." So he signed up for the investment fund and he and his wife had, by his estimate, which included interest, \$67,000 owing to them at the time of the Receivership. (i.e. \$65,000 plus \$2,000 interest which was in dispute). "When I invested Goheen and I were very good friends and I trusted him implicitly." This witness then recounted a story of how, little by little he had lost faith in Goheen; proceeding from complete confidence to complete disillusionment. It was a story not lacking an emotional element.

This money, which he says amounts to \$67,000, constitutes a large proportion of Mr. Tomlinson's net worth. His other assets consist of a cottage in Ontario worth \$25,000, a mobile home in Florida worth \$15,000 and mortgages totalling \$57,000. Such is the capital upon which he and his wife based their prospects for retirement. Mr. Tomlinson, approaching 70, looks very strong and his wife considerably younger so that the next few years could be good ones for them. One can readily understand Mr. Tomlinson's anxiety and his need to receive back at the earliest possible time the liquid funds which he has given to Goheen.

Mr. Tomlinson made a strong impression upon the Tribunal. In the view of the Tribunal this witness expressed with considerable eloquence the very just bitterness which might well be felt by all of the investors in the Allan R. Goheen Mortgage Fund. Members of the public, they have been injured. In the Tribunal's view every day that passes before they are repaid the full measure of what is rightly due to them will be a day on which they are freshly injured. This witness awakened the Tribunal to an awareness of the human factors working in this case.

It was freely admitted that Goheen had breached his fiduciary obligation to the investors. But extenuating factors were pleaded. Freely and copiously during the thirteen day Hearing a stream of really rather saccharine excuses was directed upon the panel. The Tribunal

accepts these excuses to the extent that it holds no malice towards the Applicants. But it must insist that injured members of the public be rescued and protected. The Act under which these Applicants were registered is consumer legislation, designed for the protection of the public. In accepting the grant of registration these Applicants accepted responsibility, responsibility to adhere to and perform according to the minimum permissible standard of honesty and integrity permitted in this industry. They cannot admit at one moment that they have breached fiduciary obligations - to breaches of trust - and the next claim to be honest. Painful as it may be, he who admits to a breach of trust, especially if it is a wilfull, studied breach of trust accompanied by incomplete and misleading information returns, must say good bye to the affectation of integrity. It seems that a person can be less than honest without being acutely aware of it. Also, Goheen was no doubt encouraged by the blind (even religious) faith of the investors.

The evidence discloses that Goheen failed to register mortgages which were the property of the Fund and that such mortgages were not drawn so as to show him, as mortgagee, to be a trustee, but rather that they showed him as personally the owner of them. Again the Tribunal concludes that Goheen must have known that this was wrong; wrong not only at law but morally wrong because of the risk to which the investors, beneficiaries of the fiduciary situation which existed, were exposed both by virtue of the doctrine of priorities (which deals with Registration) and by Goheen's susceptibility in common with all men to the normal risks of life such as sudden death or mental or physical incapacity or death. The Tribunal holds that he must have known what he was doing (or failing to do) was wrong and moreover it holds that at least in part his purpose in so wrongfully behaving was to protect the interests of the Applicant company and his own interests generally at the expense of those to whom he owed an undisputed fiduciary duty of care.

The O.S.C. staff became aware of the existence of the Goheen Mortgage Fund as a result of enquiries made of them on behalf of the Fellowship Baptist Pension Fund in December, 1980. The Registrar of Real Estate and Business Brokers' awareness of it derived from that. But he should have been made aware of it by reason of the Applicant Goheen's having correctly, accurately and honestly completed the information return incorporated in and forming a part of the forms he filed when applying annually for renewal of registration. Upon the evidence

before it the Tribunal cannot escape the conclusion that Goheen deliberately failed to provide the Registrar with full information or disclosure concerning the Fund he was operating (and operating to the benefit of improper objects, such as that of companies in which he personally was interested, rather than the primary interests of the investors, if at all). Had the Registrar been provided by Goheen with the information he was entitled to receive, which Goheen in the applications he prepared signed and was bound by law to give, the loss and trouble sustained by the investors and others would almost certainly have been avoided or greatly reduced because the Registrar, had he been informed, would undoubtedly have caused the affairs of the Fund to have been subject to regular inspection which in turn would have brought irregularities in Mr. Goheen's operation of it to light at an earlier stage when the damage done was very considerably less than ultimately it became. But the Tribunal, in weighing and assessing the evidence and, as well, all that was laid before it by way of argument and pleading, cannot escape the conclusion that Goheen deliberately withheld information which the forms required and which the law required him to disclose and that he did so at least in part in the advancement of his own financial interest, as he conceived it to be, that he did so willingly and deliberately and, moreover, in the undoubted knowledge that it was wrong.

The Tribunal holds that if he did not know that his conduct was wrong, and we believe that he did, he ought to have. He ought to have had enough general knowledge and awareness to have known it and he ought to have consulted lawyers and apprised himself of the law - ignorance of which is, as an excuse, of as little avail to him as it is to anyone else.

The Tribunal holds that Goheen breached his fiduciary obligations to the investors and did so wilfully and knowingly. In consequence of this his only hope to escape the full sanction of the Registrar's Proposal in respect to the Reasons designated (c) and (d) would lie in the future-looking potential of the words "reasonable grounds for belief that he will.....". These are words which contemplate the implication or implications of past conduct upon the likely course of future events. But here we have an Applicant or Applicants who firstly, freely admit past bad conduct and secondly, plead for the Tribunal's indulgence in accepting their excuses and for a pardon in the form of permission to continue as registrants under the Act while thirdly, continuing in the enjoyment of possession of assets free from attachment for the repayment of the Fund's inventors.

Mr. Goheen wishes to continue as a respected real estate broker and agrees to assist the Receiver in liquidating the Mortgage Fund. But what of Goheen's personal assets? In the absence of the personal guarantees of both Mr. and Mrs. Goheen why should these not be attached? Why should these not be liquidated forthwith at whatever price they will fetch? Why should Goheen be permitted to carry on as though nothing had happened while Mr. Tomlinson and 65 other investors await the gradual unravelling of the Applicants' affairs by the Receiver and time, so precious, especially to the more elderly investors, ticks away? The Tribunal is asked to direct the Registrar to renew the registration of such Applicants in such circumstances and to deny that "the past conduct of the Applicants is such as to afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty". After all the Tribunal has heard and seen in this case it cannot do this. Consequently, the Registrar has succeeded in establishing that his reasons (c) and (d) for refusing to renew the registration of these Applicants are valid and well justified.

As to financial responsibility, the fact that Goheen had not at the time of this hearing paid back the money which he misused (i.e. which was the subject of the breach of trust) satisfies the Tribunal that he lacks financial responsibility. Similarly, the fact that Goheen Realty Limited received financial benefits as a result of such breaches of trust and has not repaid or returned such moneys improperly received by it in full satisfied the Tribunal that it is lacking in financial responsibility. Thus the Registrar succeeds in having proven his reasons for Proposal (a) and (b). As for the fifth ground for the Proposal, Reason (e), the Tribunal makes no finding for the reason that the wrongdoing alleged therein, namely that "Goheen Limited or Goheen, or both of them, is or are carrying on activities that are, or will be, if registration is renewed or continued, in contravention of the Act or the Regulations", the Tribunal makes no finding for the reason that the wrongdoing alleged therein has not been adequately proven or disproven to its satisfaction one way or the other.

The issue has been raised as to whether interest is payable or not to the investors in this Fund - whether it is payable only if the Fund earns money. The O.S.C. in its Reasons found that as of February 15th, 1981 the 66 recorded investors were out \$78,317.72 in interest calculated at 8% on their investment. The Tribunal is of

the opinion that interest should be paid and that 8% is the proper rate at which it should be paid to these investors as that is the rate specified in the terms of the investment. However, the Tribunal desires to avoid the commission of errors in the performance of its function and will therefore refrain from attaching any condition to its Order and Decision which it considers might possibly or likely be later seized as the nurture for further costly litigation.

The Tribunal has had two issues to deal with both concerned primarily with the public interest.

1. To facilitate repayment in full to the investors in Allan R. Goheen Mortgage Fund.
2. To reach a decision on the Registrar's Proposal to refuse to renew the registration of Goheen Realty and Insurance Limited and Allan Raymond Goheen as real estate brokers.

We agree that the Ontario Securities Commission has dealt adequately with the Allan R. Goheen Mortgage Fund and we need not expand on its conclusion. On the other hand the Tribunal must do its best to ensure that the investors will be paid in full, principal and interest, for their investments. This has relevance to its decision on A.R. Goheen's registration as a broker or salesman. The Tribunal is of the opinion that upwards of 66 recorded investors have given money to the Goheen Investment Fund and that it is proper that these people be repaid together with all or any interest which may be justly due to them. As far as these investors are concerned the Tribunal's primary concerns are:

1. The ability of Goheen Realty and Insurance Limited to repay its indebtedness to the Fund which on August 31st, 1981 (Ex. 11 Tab 10 P2) amounted to \$226,638.
2. The contribution A.R. Goheen can make personally to repaying this obligation with or without registration as broker or salesman.
3. The impact that refusal to re-register would have on A.R. Goheen's willingness to do his utmost, to provide the personal guarantees of both him and his wife, to give mortgage security to the

investors on his and his wife's personal property, and to purchase the last \$100,000 of assets of the Fund. In this regard the Receiver, Mr. Mackey, said on July 5th, 1982 that the estimated "shortfall" of the Fund was from \$100,000 to \$150,000.

With the above in mind the following are comments on the net worth of Goheen Realty and Insurance Limited, Allan R. Goheen and his wife I. Muriel Goheen.

Goheen Realty and Insurance Limited August 31st, 1981 (Ex 11 Tab 10).

It is emphasized that the financial statements as at August 31st, 1981 were prepared by the company's auditors but are not audited.

Afternet earnings \$1,359 for the year they reflect a negative net worth of \$10,919. This could be substantially greater based on the realizable value of accounts receivable and the investment in Sherrian Holdings Limited. Moreover, the current assets include an advance to A. R. Goheen of \$39,888 and loans receivable of \$34,886. Commissions receivable include \$75,369 from Yonge-Rosedale Developments Ltd.

The financial statements reflect working capital of \$181,231 at August 31st, 1981 but this is after transferring, during the year, the loan payable to Allan R. Goheen Mortgage Fund in the amount of \$226,638 from Current to Long-Term Liabilities. Had this not been the above statements would reflect a deficit in working capital of \$45,407. Security for the liability to Mortgage Fund is the So-called Zurba Mortgage on property in the town of Newcastle, Township of Darlington. This security replaced the former mortgage security on the home of Mr. & Mrs. Goheen.

Allan R. Goheen, Schedule of Net Worth as of March 8th, 1982 (Ex 11 Tab 11).

Here again it is emphasized that the above statement of Net Worth is not audited.

Mr. Goheen's net worth at March 8th, 1982 is reported as \$267,081.

This includes a half interest equal to \$80,000 in his residence, 2 Bridlewood Blvd., Agincourt, Ontario subject to

a mortgage of \$55,000 (50%) or a net	
half interest of	\$ 25,000
Cottage (half interest)	12,500
Partnership interest of 80% in	
Argo Investments	43,000
Mudo Investments Limited - two thirds Interest	54,600
Retirement Holdings Limited - one third Interest	20,000
Yonge-Rosedale Developments Limited - 25% Interest	100,000
Loans Receivable - Yonge-Rosedale Developments Ltd.	<u>22,981</u>
	\$278,081

Argo Investments is a partnership to own land and mortgages. Now owns 100 acres near Huntsville and one or two small mortgages.

Mudo Investments holds one property only at 804 Dundas Street West, Whitby, Ontario.

Retirement Holdings Limited is a small company to hold property and investments for retired missionaries. It owns one eighth of a 248 suite apartment building at Victoria Park and Eglinton in Toronto and some other assets including shares in Cadillac-Fairview Co. Limited

From these assets Mr. Goheen has indicated his intention to meet the short fall in the Mortgage Fund reported by the Receiver to be between \$100,000 and \$150,000. He is personally liable for this deficiency as the Mortgage Fund is not incorporated.

The above investments involve real estate holdings principally and the underlying real estate is reported to be valued at market which, to say the least, is highly uncertain under current conditions.

In the year ended August 31st, 1981 Mr. Goheen received from Goheen Realty and Insurance Limited:	
Net increase in advance from \$20,000 to \$39,888 i.e.	\$19,888
Salary	27,700
Travel Expense	<u>7,613</u>
	\$55,201

The only reported liabilities other than the mortgage on his residence are:

Accounts Payable	\$ 1,000
Bank Loan - Bank of Nova Scotia	5,000
Deferred Income Taxes	<u>50,000</u>
	<u>\$56,000</u>

I. Muriel Goheen, Schedule of Net Worth as at March 8th, 1982 (Ex 10)

Once again it is emphasized that the above statement of Net Worth is not audited.

Mrs. Goheen's net worth at March 8th, 1982 is reported as \$413,900.

Her assets include:

A half-interest, as for Mr. Goheen, in their residence, net	\$25,0
A half-interest in their cottage	12,5
Covic Holdings Limited - 80% interest	312,2
(See Ex 12) below	
Land - Town of Newcastle - 20% interest in 120 acres	111,5
Comad Investments Limited - (see below)	54,6
Tehkummah Farm - 50% partnership	<u>19,0</u>
	\$534,8

Covic Holdings Limited has a 70% interest in the Enniskille property in the town of Newcastle, township of Darlington, which is subject to the Zurba mortgage. This mortgage has been given to the Mortgage Fund as security for its receivable from Goheen Realty and Insurance Limited. It had a balance of \$248,238.02 on March 16, 1981. (Ex 7 P.141) If this was enforced, as came out in the evidence of Mr. Norton, C.A., Mrs. Goheen's interest in Covic Holdings Limited would be substantially reduced and the reduction replaced by a receivable from Goheen Realty and Insurance Limited.

"The assets of Comad Investments Limited have been pledged as collateral for a personal debt of Allan R. Goheen. This debt is offset by a personal loan to the company from Allan R. Goheen". (Ex. 10 p3 Note 3) The personal debt of Allan R. Goheen is not apparent from his schedule of net worth (Ex 11 Table 11)

As in the case of Mr. Goheen, the value of Mrs. Goheen's assets is largely represented by real estate, the value of which is decidedly uncertain under current conditions.

In her evidence Mrs. Goheen said that her assets were available to her husband and to Goheen Realty and Insurance Limited. This indicates that her personal guarantee is available.

Exhibit 12 indicates that the Zurba mortgage is well secured.

If the real estate holdings underlying the investments appearing in Mr. Goheen's Schedule of Net Worth (Ex 11 Tab 11) and in Mrs. Goheen's Schedule of Net Worth (Ex 10) fail to realize their reported values it may become very difficult for Mr. Goheen to meet the deficiency in the liquidation of the Mortgage Fund. This problem would be significantly increased by the loss of Mr. Goheen's income from Goheen Realty and Insurance Limited.

The public interest, including the investors in the mortgage fund, may therefore be best served by permitting one of the following three alternatives:

1. The continued broker registration of Goheen Realty and Insurance Limited.
2. The continued broker registration of Allan R. Goheen to another broker.
3. The registration of Allan R. Goheen as a real estate salesman.

The third alternative could be unconditional whereas the others would have to be conditional upon:

1. The personal guarantees of both Mr. & Mrs. Goheen for the deficiency in the liquidation of the Mortgage Fund and for the indebtedness of Goheen Realty and Insurance Limited to the Mortgage Fund.
2. Confirmation of the assignment to the Mortgage Fund by Mr. Goheen of the profits and/or proceeds from Yonge-Rosedale Developments Limited which are to be received by June 1983.
3. Mortgage security on the residence of Mr. & Mrs. Goheen.
4. Clarification of the personal obligation of Mr. Goheen for which the assets of Comad Investments Limited are pledged, as referred to above in connection with the Schedule of Net worth of I. Muriel Goheen - and confirmation that there are no other undisclosed obligations of Mr. or Mrs. Goheen.

5. Elimination of the shortage in the Trust Fund of Goheen Realty and Insurance Limited.

The Tribunal's decision concerning registration has been reached after great deliberation as to:

1. What will serve best to ensure repayment in full to the investors in the Fund and
2. The extremely heavy price in personal reputation, legal fees, Receiver's costs and productive activity that A. R. Goheen has already suffered.
3. The fact that the Fund is strictly in a liquidation situation.
4. The receipt in April, 1982 of a favourable ruling on the Yonge-Rosedale Developments Limited MURB project which is estimated to produce a profit of \$125,000 by June 1983 for A. R. Goheen according to Mr. Peck. This profit has been assigned by Mr. Goheen to the Allan R. Goheen Mortgage Fund.
5. The fact that no complaints have been filed with the Registrar concerning Goheen Realty and Insurance Limited or Allan R. Goheen in his capacity as a Real Estate Broker.

Although there is no application before the Registrar, the Tribunal is of the opinion that it might be beneficial having in mind the interests of the investors, for Goheen to be registered as a salesman in which capacity he would probably be useful in minimizing the ultimate deficiency in the Fund. The Registrar might receive and possibly accede to such an application upon terms such as he might consider appropriate and in accordance with the tenor of these Reasons. However, the Tribunal holds that the Registrar was right in proposing to refuse the registration of these Applicants for the first four reasons given in his Notice of Proposal as stated.

The Tribunal directs the attention of both parties to this hearing to the provision of S.10 of the Real Estate and Business Brokers Act, R.S.O. 1980 ch.431:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

and when (but not before) investors in the Fund referred to in these proceedings have been, in the Registrar's unfettered opinion, fully and properly repaid all that is owing to them, the Tribunal would hope that he would then reconsider this opinion as to the Applicants suitability for further participation in this industry in their status as heretofor, that is, as Registered Brokers, and the Tribunal wishes to make it clear that the "material circumstances" which are of paramount concern to it are those which relate to the as yet unsatisfied investors.

The Tribunal therefore Orders and Directs that the Registrar forthwith proceed to implement his Proposal and to refuse to grant renewal of registration to the Applicants herein as proposed and makes this Order without conditions.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.*

STEVE HERMAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF REAL
ESTATE AND BUSINESS BROKERS

TO REFUSE TO REGISTER THE APPLICANT

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
RONALD O.B. RICHARDSON, MEMBER

COUNSEL: C. OWEN SPETTIGUE, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING

DATE: March 31st, 1982

REASONS FOR DECISION AND ORDER

Steve Herman has applied for registration as a registered real estate salesman. The Registrar of Real Estate and Business Brokers has refused his application for the reason shown in his Notice of Proposal dated October 5th, 1981 and Herman, as Applicant herein, has appealed from that decision to this Tribunal. The Registrar's reason for refusing to register is based on Section 6 Subsection 1(b) of the Real Estate and Business Brokers Act, which reads as follows:

An Applicant is entitled to registration or renewal of registration by the Registrar except where the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Mr. Herman had previously been registered under the Motor Vehicle Dealers Act, a sister statute, also administered by the Ministry of Consumer and Commercial Relations. Mr. Herman lost his registration under the Motor Vehicle Dealers Act in very disgraceful circumstances, particulars of which are to be found in the Tribunal's decision reported at 9 C.R.A.T. Reports 1980 at p. 7, a decision which was upheld by the Divisional Court of Ontario in its decision reported at 29 O. R. (2d) p. 431.

As a general principle, it may be said that a dishonest salesman of motor vehicles is likely to make a dishonest salesman of real estate. At today's hearing Mr. Herman created an unfavourable impression. But a Mr. Paul Klassen has come forward with an undertaking to engage Mr. Herman as a salesman in his real estate company, Klassen Real Estate Inc., of Leamington, which holds registration as a registered real estate broker (or brokerage).

Mr. Klassen has been warned that any dishonest practices by Mr. Herman as a salesman employed by the Klassen firm will be imputed to his firm as employer and immediately place the Klassen broker's registration in jeopardy. Mr. Klassen has indicated that he understands this and, further, has undertaken as well to post a bond of \$3,000.00 to guarantee Mr. Herman's conduct and to police his activities. He has told the Tribunal that he considers him a good salesman and that he has paid for his crimes. The Tribunal feels great reservations about this but is unwilling to perpetuate the sufferings Herman has already endured and yields with the greatest misgivings to the proposition that he ought to be given a second chance in another industry, but under strict conditions and controls. Accordingly, the Tribunal, by virtue of the authority vested in it under the Real Estate and Business Brokers Act, directs the Registrar to grant temporary and conditional registration to the Applicant upon the following terms and conditions:

1. Registration to terminate after six months and be renewable on the approval of the Registrar for a further six month period. Re-registration on this basis is to continue until there have been four six-month registration periods in each of which the Applicant has earned commissions.
2. The Applicant will only be eligible for registration as a real estate salesman with Klassen Real Estate Incorporated.
3. Klassen Real Estate Incorporated or Mr. Paul Klassen to post a bond for at least \$3,000.00 in a form acceptable to the Registrar and subject to forfeiture in the event of any conduct inconsistent with registration in the opinion of the Registrar.
4. While registered as a real estate salesman, the Applicant will advise the Registrar of any other business activities prior to engaging in them, and such activities will be subject to the approval of the Registrar.
5. The Applicant will not apply for a real estate broker's registration prior to three years after being registered as a real estate salesman.
6. The Applicant will not own any shares in Klassen Real Estate Incorporated prior to becoming a broker.

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under the Real Estate and Business Brokers Act, Section 9,

The Tribunal directs the Registrar to grant conditional registration subject to such terms and conditions as outlined in the reasons for the decision delivered orally.

ANDREAS HORHAGER

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
REAL ESTATE AND BUSINESS BROKERS

TO SUSPEND THE REGISTRATION OF THE APPLICANT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
SADIE MORANIS, MEMBER

COUNSEL: JOHN A. CAMPION, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING
DATES: February 11, 12 and 15 , 1982

REASONS FOR DECISION AND ORDER

Andreas Horhager is a real estate broker and was employed as managing broker at all material times by Cimerman Real Estate Limited in charge of its office located at 911 Bloor Street West, in the City of Toronto.

Newton G. Monteith is a real estate salesman and was employed as a salesman at all material times by Cimerman Real Estate Limited at its offices located at 911 Bloor Street West in the City of Toronto, and was so registered to Cimerman.

Newton G. Monteith was under the supervision and direction of Andreas Horhager; the latter was available for the guidance and assistance of the former.

One Sheran Johnston became aware of 45 Alberta being up for sale by virtue of a Cimerman sign and she had a desire and willingness to purchase Alberta as it fitted her particular needs. Subsequently, Johnston entered into a relationship as principal with Monteith in respect of the sale of her property at 490 Rushton Road, and the making of an Offer of purchase in respect of 45 Alberta.

The Tribunal finds and indeed, it is not disputed, that Johnston made it clear to Monteith that she would buy Alberta only if she could sell Rushton, and conversely would sell Rushton only if she could purchase Alberta.

Monteith was instrumental in the acceptance by Johnston of an Offer which bound her to sell Rushton unconditionally. The Offer was obtained in conjunction with the real estate firm of A.E. LePage following a multiple listing from Johnston to Cimerman.

Johnston was persuaded to accept the Offer to sell Rushton Road in her belief that there would be no question with respect to the purchase by her (and an associate) of Alberta. In this she relied on Monteith being aware of her position with respect to selling and buying. Concurrently, Johnston and her associate made an offer to purchase Alberta through Cimerman with Monteith as salesman.

The Tribunal finds that Monteith had an awareness that the sale of Alberta was not a matter of no doubt for he knew that a similar deal had fallen through, that there was an outstanding work order that had not yet been finalized, and that there were marital difficulties between the vendors which could create difficulties. He did not inform Johnston of these difficulties. The Offer to Purchase 45 Alberta was not accepted compelling Mrs. Johnston to extricate herself from the sale of Rushton Road suffering monetary loss and inconvenience.

During the course of the above transaction, the following had occurred:

On or about the 5th-6th March, Sheran Johnston had entered into the aforesaid Multiple Listing Agreement with Cimerman (Exhibit #5), and there was drawn up a Cimerman Offer Information sheet regarding Alberta (Exhibit #6) with Johnston and associate as purchasers. To this Information Sheet is attached a sheet with two draft conditional clauses related to the sale of 490 Rushton Road and to a work order.

On or about the 16th of March, 1980, Horhager had attended with Monteith upon Johnston to persuade her to accept a certain offer to purchase 490 Rushton Road. This offer was unacceptable to Johnston because of insufficient cash, and despite a sign back was not concluded. The purchase of 45 Alberta did arise in the discussion that took place at that time. The Tribunal finds that Horhager's comments with respect to this were in the ordinary course, and not such from which a representation or assurance could be inferred that the purchase of Alberta was certain.

In respect of the eminent offer to purchase on 45 Alberta, a discussion had taken place between Monteith and Horhager and the latter advised the former not to submit a conditional offer as it would be a waste of time. Horhager was also aware at the time of the difficulties that existed in respect of 45 Alberta Street. The Tribunal does not find Horhager's remarks as being a direction to Monteith to breach a duty to a client.

The Tribunal finds Horhager did not participate and had no knowledge of the presentation by LePage of an Offer on 490 Rushton Road until after acceptance. The Tribunal finds that there was no discussion related to making the Rushton offer subject to a condition.

The Tribunal finds that Horhager did not know of the position of Johnston that she would buy Alberta only if she could sell Rushton and conversely would sell Rushton only if she could purchase Alberta. Neither Monteith, nor Johnston, had made Horhager aware of this very firm position of Johnston. The Tribunal finds that Horhager made no representations to Johnston in regard to the purchase and sale.

The Tribunal is of the opinion that Horhager could have made himself more knowledgeable in the matter, but his shortcoming in this regard under the circumstances do not justify a suspension.

The Tribunal reiterates its position that a high standard of performance is expected of those in the real estate industry in dealings with the public. Knowledge and experience is in the main on the side of the broker and salesman. The broker's status is such that he must execute his duty of direction and supervision of and assistance to a high degree.

The Tribunal finds there was no failure under the circumstances on the part of Horhager to exercise care and skill with respect to Johnston nor any failure to exercise care and skill as supervisory broker in respect of Monteith.

Accordingly, the Tribunal finds that the past conduct of the applicant herein does not afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; and accordingly directs the Registrar not to carry out his proposal.

GEORGE IVAN

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION OF THE APPLICANT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
HARRY C. McARTHUR, MEMBER

COUNSEL: J. EDWARD WHITESIDE, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING

DATE: July 14, 1982.

REASONS FOR DECISION AND ORDER

The Applicant herein George Ivan (referred to as Ivan) is a registered broker under the Real Estate and Business Brokers Act in the employ of Peter Sikkau Realty Limited, also a registered broker.

The Registrar has issued a Notice of Proposal to revoke the registration for reasons emanating out of an Agreement of Purchase and Sale negotiated by Ivan and dated the 31st day of July 1981 between Four Seasons Construction and Isabel E.D. Martin (Townsend) as vendor. The Offer contains the following clause:

"1. Purchaser submits with this offer ONE THOUSAND dollars (\$1,000.00) cash/cheque payable to Vendor's Agent as a deposit to be held by him in trust pending completion or other termination of this Agreement and to be credited toward the Purchase Price on completion."

and also a fifth clause (unnumbered:

"If the PURCHASER or his agent are not able to obtain the said first mortgage at the rate of 11% per annum for term of Five (5) years and repayable in blended

monthly payments [of a certain figure] within TEN (10) banking days from acceptance of this offer by the VENDOR, then this offer becomes null and void and the PURCHASERS deposit shall be returned in full without interest."

Collateral within the acceptance clause of the Offer by the Vendor, there is the vendor's agreement with the Agent:

"above named in consideration for his services in procuring the said Offer, pay him on the date above fixed for completion, a commission of 5% of an amount equal to the above mentioned sale price which commission may be deducted from the deposit. I hereby irrevocably instruct my Solicitor to pay direct to the said Agent any unpaid balance commission from the proceeds of the sale."

Pursuing their legal position that because, as was maintained, they were unable to arrange for the mortgage referred to in the Offer, the purchasers obtained a judgment against Ivan which remains unsatisfied. That judgment has been appealed. After the 31st of August 1978 Ivan, having received an opinion from his solicitor, removed the \$1,000.00 deposit from his trust account.

The Tribunal finds that the entitlement to the return of the deposit to the purchasers from Ivan is a matter of dispute yet to be finally settled by a Court of law. It is clear that Ivan was aware that his rights under the collateral agreement vis a vis the payment of commission was subject to the provision relating to the deposit as set out in the body of the Agreement of Purchase and Sale drawn by him.

In the light of that provision, and the position of the purchasers, he cannot categorically take the position that the deposit is the property of the vendor and that he can claim against it. The Tribunal is of the opinion that unless the Court rules that a purchasers are not entitled to a return of the deposit, the deposit is to be held in trust as provided for by the agreement. Failure to do so is contrary to Section 20 of the Act and such conduct affords reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

By virtue of the authority vested in it under the Real Estate and Business Brokers Act, Section 9, the Tribunal directs the Registrar not to carry out his proposal provided that the Applicant shall desposit on or before the 29th day of July 1982, the sum of \$1,000 into a trust account in accordance with the requirements of the Registrar in that regard pending the disposition of the appeal referred to in Exhibit 7, and provided further that the registration shall be subject to the term and condition that the Applicant will diligently pursue the said appeal and that the registration shall be of a kind referred to in the industry as associate broker, similiar to the present situation of the Applicant.

NEWTON G. MONTEITH
ANDREAS HORHAGER

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
REAL ESTATE AND BUSINESS BROKERS

TO SUSPEND THE REGISTRATION OF THE APPLICANTS

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
SADIE MORANIS, MEMBER

COUNSEL: NEWTON G. MONTEITH, appearing in person
JOHN A. CAMPION, representing Andreas Horhager
PETER J. WILEY, representing the Respondent

HEARING
DATE: February 10th, 1982

REASONS FOR TRIBUNAL RULING

The ruling is in the matter of an application for separate hearings by the applicant Andreas Horhager before different panels.

Though it is not clear that the applicant would be prejudiced by a single hearing, a request has been made on that basis. The objection of Mr. Monteith is on the basis that from the point of view of the Tribunal, the matter could be dealt with perhaps more efficaciously if the two applications were dealt with together and there is merit in his objection. However, the ease of conduct of its hearings is secondary to the criteria by which the Tribunal should base its decision. Mr. Monteith has in no way claimed that his position would be prejudiced by separate hearings. Accordingly, the application for separate hearings will be granted.

The Tribunal rules further that there is no validity to the request for different panels.

NEWTON G. MONTEITH

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
REAL ESTATE AND BUSINESS BROKERS

TO SUSPEND THE REGISTRATION OF THE APPLICANT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
SADIE MORANIS, MEMBER

COUNSEL: NEWTON G. MONTEITH, appearing in person
PETER J. WILEY, representing the Respondent

HEARING

DATE: February 10th, 1982

REASONS FOR DECISION AND ORDER

Newton Monteith is a real estate salesman and was employed as a salesman at all material times by Cimerman Real Estate Limited at its offices located at 911 Bloor Street West in the City of Toronto, and was so registered to Cimerman.

One Sheran Johnston became aware of 45 Alberta being up for sale by virtue of a Cimerman sign and she had a desire and willingness to purchase Alberta as it fitted her particular needs. As a result, Johnston entered into a relationship as principal with Monteith in respect of the sale of her property at 490 Rushton Road, and the making of an Offer of purchase in respect of 45 Alberta.

The Tribunal finds and indeed, it is not disputed, that Johnston made it clear to Monteith that she would buy Alberta only if she could sell Rushton, and conversely would sell Rushton only if she could purchase Alberta.

Monteith was instrumental in the acceptance by Johnston of an Offer which bound her to sell Rushton unconditionally. The Offer was obtained in conjunction with the real estate firm of A.E. LePage as Cimerman had obtained a multiple listing from Johnston.

Johnston was persuaded to accept the Offer to sell Rushton Road in her belief that there would be no question with respect to the purchase by her and an associate of Alberta. In this she relied on Monteith being aware of her position with respect to selling and buying.

The Tribunal finds that Monteith had an awareness that the sale of Alberta was not a matter of no doubt for he knew that a similar deal had fallen through, that there was an outstanding work order that had not yet been finalized, and that there were marital difficulties between the vendors which could create difficulties. The Tribunal finds that there was under the circumstances a duty on Monteith to make the sale and purchase conditional for the protection of the interests of his client Johnston. This he failed to do. The Offer to Purchase 45 Alberta was not accepted compelling Mrs. Johnston to extricate herself from the sale of Rushton Road suffering monetary loss and inconvenience.

Monteith has justified his failure to protect Johnston (by resort to conditional provisions) in that he was obeying instructions of a superior that no conditional clauses were to be utilized. The Tribunal makes no finding in respect of this statement by Mr. Monteith, with respect to the same having taken place. However, the Tribunal is of the opinion that even if such were the case this does not excuse Monteith. His primary duty was to Mrs. Johnston. His belief as to his obligation to his superior, sincere though it may have been, was in error. This is the ruling of the Tribunal.

There is a great duty on the part of a salesperson to act with care in a sell/buy situation. That duty is even heightened when the circumstances of a situation such as that of Mrs. Johnson were abundantly clear. The shoals ahead were obvious.

The Tribunal notes that Monteith had available to him two recourses:

- (1) Firstly, he could have gone to the vendors of Alberta to clarify the likelihood of their ready acceptance of the Offer.
- (2) Secondly, he could have made it clear to A.E. LePage the circumstances of Johnston so that the condition would be inserted in the Offer in respect of the sale of Rushton Road.

Either simple precaution would have avoided the difficulties that Johnston was subsequently to incur.

The intricacies of contemporary dealings in real estate require of individuals in the industry a high degree of care in the protection of clients. In this instance, Monteith took no steps in the protection of a client who

entrusted her affairs to him. His level of performance is not acceptable and he failed in his responsibility to his client.

Accordingly, the Tribunal finds that Monteith failed to carry on business with integrity and in accordance with law and directs the Registrar to carry out his proposal.

ADVENTURE TOURS

APPEAL FROM THE DECISION OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW THE CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C. CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: BONNIE A TOUGH, representing the Claimant

MICHAEL D. LIPTON, Q.C., representing the Respondent

HEARING

DATE: April 21, 1982

REASONS FOR TRIBUNAL RULING

Strand Holidays Limited o/a Strand Holidays and Strand Cruises (hereinafter referred to as Strand) was registered under the Travel Industry Act as a travel wholesaler, and was a participant in the Compensation Fund up to April 11th, 1981. Arkard Enterprises Ltd. o/a Adventure Tours is registered under the Travel Industry Act as a travel wholesaler and is a participant.

Adventure Tours has made a claim against the Compensation Fund set up under the schedule to Regulation 938 under the Travel Industry Act and the Board of Trustees has determined the claim is not eligible for payment.

Counsel for the parties have agreed that a preliminary question of law should be determined by the Tribunal: "assuming that all of the requirements of Section 15(1) subsection 1 of the schedule are met, can a travel wholesaler (in this case, Adventure Tours) who has acted throughout as a travel wholesaler come within the meaning of the word 'client' for the purpose of making a claim against another wholesaler (in this case Strand) under the particular section 15(1)(1)?".

In the Manitoba Travel Association case (unreported, released on the 15th of February, 1982) the Tribunal set out certain principles which it holds are applicable, namely:

"Section 15 sets out in great detail under what circumstances there is entitlement, and accordingly when payments can be made out of the Compensation fund. The Tribunal is of the opinion that a claimant to succeed must bring itself within some provision of the section. The Tribunal is also of the opinion that in its determination it must read all the provisions together."

Counsel for the claimant has argued that the claimant comes within Section 15(1)(1) and should be considered as a client thereunder, by reason of its meeting a dictionary definition thereof and as being in keeping with the intent and spirit of the provisions for compensation. Counsel has argued that if the intent had been to exclude travel wholesalers from the definition the legislature would have used a term other than the broad term of "client".

The Tribunal views Section (1) as setting up the situation under which various categories of claimants are entitled to make claims. It had occasion to deal with a claim in the Manitoba Travel Association case. In that matter, the Tribunal in dealing with the claims of certain travel agents found that the entitlement of travel agents having been delineated in Section 15(1)(2) i.e. the matter of entitlement with respect to that category of claimant having been dealt with in that subsection, if the claimant failed by reason of some other factor within that subsection then the claimant could not maintain it could come under the purview of another subsection.

The Tribunal is of the opinion that Section 15(1)(3) delineates the entitlement of another category of claimant that is travel wholesaler. If a travel wholesaler cannot bring itself within the meaning of that subsection, it cannot maintain a claim under another subsection, namely subsection 15(1)(1).

Counsel for the applicant has argued that Section 15 (1)(3) should be considered as expansionist, or an addendum to entitlement by a travel wholesaler under Section 15 (1)(1). The Tribunal does not agree. The Tribunal is of the opinion that the entitlement by virtue of Section 15(1)(3) excludes a travel wholesaler from entitlement under Section 15(1)(1) and the travel wholesaler is not within the meaning of client for that subsection.

Accordingly the Tribunal finds that Adventure Tours is not a client within the meaning of Section 15(1)(1); the answer to the question is in the negative.

This hearing stands adjourned sine die.

CANADASIA TRAVEL LIMITED

APPEAL FROM PROPOSAL OF REGISTRAR UNDER
TRAVEL INDUSTRY ACT

TO REVOKE APPLICANT'S REGISTRATION AS A
TRAVEL AGENT

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN as CHAIRMAN
HARRY SINGER, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: MICHAEL ARMSTRONG, representing the Applicant
A. N. MAJAINA, representing the Respondent

HEARING
DATE: January 8, 1982

REASONS FOR DECISION AND ORDER

On October 14, 1981 the Registrar of Travel Agents issued a Notice of Proposal and Order which was duly served upon the Applicant Canadasia Travel Limited. The Registrar's Proposal contained therein was pursuant to Sections 4 and 5 (2) of the Travel Industry Act, R.S.O. 1980, and the Registrar's Order contained therein was pursuant to Section 7 of the Act. The Registrar's Proposal was that he refused to renew the registration of the Applicant upon the following grounds:

- (1) Canadasia is a corporation and, having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, within the meaning and contemplation of Sections 4(1)(c)(ii) of the Act; or
- (2) Canadasia is a corporation and the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, within the meaning and contemplation of Section 4(1)(c)(iii) of the Act; or
- (3) Canadasia is carrying on activities that are, or will be, if its registration is continued, in contravention of the Act or the regulations, within the meaning and contemplation of Section 4(1) (d) of the Act.

These grounds upon which he was proposing to terminate this registration coincided with the provisions of Section 4 (1) of the Act which reads as follows:

4(1) An applicant is entitled to registration or renewal of registration as a Travel Agent or Travel Wholesaler by the Registrar except where,

(c) the applicant is a corporation and,

(ii) having regard to his financial position it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(iii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

In perusing the portions of Section 4 quoted above the alert reader will note the word "or" which appears recurrently and will immediately realize that any one of the objectionable situations or circumstances which are detailed therein will, if it exists in respect to an application either for registration or renewal thereof, be sufficient to have a fatal effect upon such application when proven. In other words, the effect of the word "or" as used in the section is that any one of the allegations made by the Registrar in support of his Proposal will, if proven, constitute and provide adequate and sufficient grounds to necessitate its implementation.

In this case the Registrar listed eight potentially fatal reasons in support of his Proposal (including one that was added at the hearing) and thereby put the Applicant into what was prima facie an extremely serious position from the very outset. It was for that reason that the Tribunal granted two adjournments, one in November 1981 and another one in December 1981. This was in order to ensure that the Applicant should be represented by counsel, and by well-briefed and skilled counsel (as was eventually the case). But even with that advantage the charges and the evidence adduced at the hearing in the end proved overwhelming. Late in the hearing, which went on for nearly seven hours, counsel for the Registrar, in what we may call a lethal cross examination, succeeded in educing from the sole witness for the Applicant, its manager and the person who had effective control of its operations at all material times, Mr. Anthony Anden, the admission, (under oath) that the Applicant

had been in default, on diverse occasions, in making payment to the Compensation Fund contrary to item 4 of Section 11 of the Schedule to the Regulations made under the Act and, moreover, that while registered merely as a travel agent the Applicant was selling airline tickets thereby acting as a travel wholesaler without being registered as such and also that he (Anden) had altered certain documents (or a document) with the deliberate intention of giving a false impression that the Registrar's Order (which was part of the Notice of Proposal and Order mentioned in the first paragraph hereof, above) which was a temporary restraining order restraining the Applicant from carrying on any new business until the hearing of this matter had been complied with, as well as that the Orders of this Tribunal, continuing and reinforcing the Registrar's Order, which were given as conditions of the adjournments granted as aforesaid in November and December, had been complied with. Upon hearing these admissions of the Applicant's manager and principal executive officer that the allegations (or Reasons for Proposal) set out at paragraph 6(1), (2) and (3) (b) of the Registrar's Notice of Proposal and Order were in fact true, the Tribunal accepts the same as proven.

Upon hearing other and further evidence set before it at this hearing the Tribunal also accepts as proven the Registrar's allegations that the Applicant has failed to keep proper records as required, has failed to provide proper statements to the Registrar as required, and has failed to maintain adequate working capital, all as alleged.

At this point the Tribunal would like to deal with what all parties to this hearing, with the possible exception of Mr. Anden himself, recognized as a problem underlying the whole unsatisfactory and indeed intolerable situation presented in this case. Mr. Cavan, the Registrar, in his evidence called it a problem which was "at the top of the list" and "one of the main reasons he is here today". Counsel for the Registrar alluded to it when he said "Mr. Anden is his own worst enemy. He punishes himself but shouldn't be permitted to punish the community at large at the same time". Counsel for the applicant said "Mr. Anden's biggest problem is communication". What we are alluding to is the behaviour of Mr. Anden, the Applicant's principal operator. Mr. Anden, a melancholy, gently well-spoken, somewhat inscrutable gentlemen, throughout the whole period under review has displayed an intractable, obstinate, dogged perversity. He repeatedly failed to answer letters, return phone calls, to keep books and records even when he had promised to do so and been painstakingly and repeatedly instructed on how to do so by ministry personnel. He has displayed a quiet but immovable determination not to co-operate.

Iron determination such as this is admirable in the

proper context. In this case, however, the officials of the ministry were not agents of oppression - their duty was to ensure the maintenance of minimum standards in an industry in which the Applicant had chosen to operate, not as an exercise of power for its own sake but for the benefit and protection of the public at large. The confrontation of which this present written decision is the full-term offspring was engendered by Mr. Anden through his tacit determination not to conform to reasonable requirements of law. It was said on his behalf that he had never hurt anyone or that there had only been one complaint from a member of the public in respect of which he deserved no more than a portion of the blame. But a dangerous situation need not result in injury to someone before it ought to be remedied and we find that principle very applicable here.

Mr. Anden did not alone constitute the only person involved in the Applicant corporation. There were other shareholders, including his wife (the majority shareholder) and other individuals all but one of whom reside outside Canada. These persons have been at fault. Their responsibility as shareholders and officers (as they are designated in at least one recent information return) has been to inform themselves and to exercise some control or influence over or upon the manner in which the corporation in which they were interested was run. This was a responsibility owing to the community in which their company chose to carry on business and applied for and accepted a commercial registration together with the obligations and duties thereto relating. Whatever hardship may fall upon these people as the result of this decision, as is the case with Mr. Anden, it will have been earned.

Section 6 of the Travel Industry Act provides in part that the Tribunal may substitute its opinion for that of the Registrar and/or may attach such terms and conditions to its order or to the registration (if it sees fit to allow the same) as it considers proper to give effect to the purposes of the Act. In contemplating the granting of renewed registration upon terms such as to vary the proposal of the Registrar (in any case where this could be done or might be considered appropriate) the Tribunal asks itself what is the likelihood that such terms or other conditions would likely be obeyed and carried out. Ironically, that question has already been answered by Mr. Anden in admitting the Applicant's failure to obey and fulfill the terms of this Tribunal's two adjournment orders, granted just during the last few weeks.

Upon due and lengthy deliberation and for the reasons set out above, not without considerable sympathy, the Tribunal upholds the proposal of the Registrar appointed under Section 2 of the Travel Industry Act and directs that the Applicant's registration as a registered travel agent forthwith be revoked.

FRANK HARGARTEN

APPEAL FROM THE DECISION OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT DETERMINING THE CLAIM
OF THE CLAIMANT

TO BE NOT ELIGIBLE FOR PAYMENT

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: FRANK HARGARTEN, appearing in person
MICHAEL D. LIPTON, Q.C., representing the Respondent

HEARING
DATE: February 18th, 1982

REASONS FOR DECISION AND ORDER

This has been a claim against the Compensation Fund established pursuant to the Travel Industry Act.

The claimant Frank Hargarten booked a west coast cruise for himself and his wife through a registered travel agent (Lincoln Travel Associates) at a cost of some \$2,434.00 and paid \$609.02 as a deposit on January 19, 1981. The balance, some \$1,825.00, was paid later, on April 8, 1981.

Between these two dates, namely on March 23, 1981, the registration (under the Act) of the Travel Agent was voluntarily surrendered.

The Board of Trustees refunded the original deposit, the said \$609.02, to the claimant on the grounds it had been made during the currency of the Registrant's registration under the Act but refused to repay to the claimant the said further sum of \$1,825 on the grounds that it was a payment which had been made at a time when the Registrant was no longer registered, at a time when the fund was therefore not liable under the terms of the Statute.

At the hearing consideration was given by way of analogy to insurance law or agency law as to whether the Registrar or the Trustees were bound to communicate to the public at large that the protection afforded by the Act and the Fund established under its provisions was terminated concurrently with the lapsing of the registered travel agent's registration or whether such was the case.

The Tribunal finds that the protection afforded by the Fund did lapse with registration and that the Act imposes no duty of communication to the public at large.

Accordingly, the Tribunal finds that the Trustees were lawfully entitled to disallow the second part of the claimant's claim for the refund of the sum of \$1,825 referred to.

Additionally, the Tribunal found no evidence that the claimant had diligently pursued his claim against the former registrant by other means available to him.

The Tribunal views this as a sad case in which the claimant and his wife appear to have been victims. We understand how they may have believed that their final payment was protected and would have been happy to have been able to help them but upon due consideration of the Statute establishing the Compensation Fund, its provisions and how it operates, we are unable to discover the grounds upon which this would be possible.

The Tribunal reluctantly directs that the claim be and the same is hereby disallowed.

LAWSON McKAY TOURS

APPEAL FROM THE DECISIONS OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT DETERMINING THE CLAIMS
OF THE FOLLOWING CLAIMANTS

TO BE NOT ELIGIBLE FOR PAYMENT:

MRS. R. M. BARR
MRS. KATHLEEN GROOM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
J. GORDON ALEXANDER, MEMBER

COUNSEL: NEAL SMITHEMAN and SAMUEL R. RICKETT representing the
Claimants

MICHAEL D. LIPTON, Q.C., representing the Respondent

HEARING November 16, 17, 20, and 30, 1981
DATES: December 15, 16, and 17, 1981
February 1, 2, 9 and 22, 1982

REASONS FOR TRIBUNAL RULING
REFUSING CERTAIN AFFIDAVIT EVIDENCE

In the matter of a request for a hearing by Mrs. R. M. Christine Barr and Kathleen Groom, counsel for the claimants has applied to have admitted as evidence, affidavits by the claimants in proof of the payment of monies claimed. The application has been objected to by counsel for the Board of Trustees.

A hearing by the Tribunal in respect of matters under the Travel Industry Act is set out in section 16 of Revised Regulations of Ontario 938 where it is stated in subsection 3:

"Where a claimant requires a hearing before the Tribunal in accordance with subsection (1), the Tribunal shall appoint a time for and hold the hearing and, after affording the claimant an opportunity to be heard, may allow the claim, or any part thereof, and shall direct the Trustee to pay the amount allowed or may refuse to allow the claim, or any part thereof."

The procedure before the Board of Trustees is not relevant to the procedure before the Tribunal in that requirements or powers may or may not be necessarily the same; it is not necessary in this Ruling by the Tribunal to make reference to the procedures before the Board of Trustees.

The nature of the hearing is not defined in the Regulation and is not defined in the Travel Industry Act.

There is no description of the nature of the hearing in the Statutory Powers Procedure Act 1971.

Counsel for the Board has referred to the Manual of Practice prepared by D. W. Mundell, Q.C. and in particular to a comment, section (3) on page 13, headed "Procedure at Hearing", sub-heading (a) Oral hearing, and I quote:

"Although not expressly provided, the hearing contemplated by the Act is obviously an oral hearing at which witnesses may be called and cross-examined. A party is entitled to insist upon such a hearing subject to the discretion of the tribunal as to the extent to which it may admit evidence inadmissible in court and unsworn evidence. Where reasonable, to avoid delay and expense, the tribunal may dispense with unnecessary formalities.

It is open to the parties to agree however to a hearing other than an oral hearing." (see ante, page 7) (i.e. para. 4 therein)

In this hearing there are two parties the claimant and the Board. I stress again within the comment of the phrase "a party is entitled to insist upon such a hearing...", which means that all parties have the right to insist upon such a hearing.

The Tribunal notes that there is stated a discretion of the Tribunal as to the extent to which it may admit evidence inadmissible in court and unsworn evidence. Reference can be made to section 15 which has been cited by counsel for the claimants in support of his application. But it is quite evident that the section referred to is the basis upon which the discretion of the Tribunal may be exercised.

Again, I refer to the fact that Mundell refers to the fact that an oral hearing need not be held in accordance with

section 4 of the Statutory Powers Procedure Act. Here we do not have agreement by the parties as required by the Section.

This Ruling is not to be taken to state that the Tribunal cannot admit affidavit evidence. It has this power, indeed it has the power to admit evidence which is unsworn and that could be a document other than an affidavit. But it would be patently questionable whether the Tribunal should admit an affidavit where the basis of the affidavit is the very basis of the claim and the request for hearing. While the Tribunal is not bound by the rules of court, it does have reference to them and counsel for the claimant has referred to Practice Rule 268. It is noted that the rule has the exception "where the other party bona fide desires the production of a witness for cross-examination, and such witness can be produced, an order shall not be made authorizing his evidence to be given by affidavit." Counsel for the Board has exercised his right to request a hearing that cross-examination may take place in respect of the specific claim regardless of whether there have been any other hearings held in relationship to the general factual situation.

This is not to say that the Tribunal is bound in all instances to have an oral hearing because a cross-examination is required by counsel for an opposing party. It has been stated in Administrative Law and Practice by Robert F. Reid (now Mr. Justice) on page 95:

"It has been stated broadly that 'an administrative tribunal is not bound to hold oral hearings if they give the parties the chance to state their case in writing'."

If the Tribunal were to follow that procedure it would be a procedure that would have to be initiated right from the very beginning of the hearing in order that parties might have an opportunity of making their case, replying thereto and rebutting. No order with respect to having a hearing other than orally has been made by the Tribunal herein.

The Tribunal notes that in this instance in the course of the proceedings with respect to the claims under the general factual situation there has been ample opportunity given to all claimants to appear. February 9th is some considerable distance from the commencement of these proceedings on November 16th. Inconvenience, under the circumstances, should not be the basis for the acceptance by the Tribunal of the particular affidavits being submitted.

The application therefore is denied.

TRAVEL INDUSTRY ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 509

IN THE MATTER OF the decisions of the Board of Trustees made pursuant to Section 16(1) of the Schedule to Revised Regulation of Ontario 938 under the Travel Industry Act.

Determining certain claims not eligible for payment

AND IN THE MATTER OF an application for hearings respecting certain claims by

AGNES CLARK
MS. ELIZABETH CLARE
BETTY MARSHALL
LINDA SUGUITAN
HELEN TOBY

Claimants

and

BOARD OF TRUSTEES APPOINTED UNDER SECTION 5 OF THE SCHEDULE

Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Helen J. Morningstar, Member
J. Gordon Alexander, Member

Upon the matter coming before the Commercial Registration Appeal Tribunal commencing November 16, 1981, in the presence of:

Neil Smitheman and Samuel R. Rickett,
counsel for the Claimants

Michael D. Lipton, Q.C., counsel for the
Respondent

HEARING November 16, 17, 20, and 30, 1981
DATES: December 15, 16, and 17, 1981
February 1, 2, 9 and 22, 1982

RULING IN APPLICATION
TO GRANT REQUEST FOR HEARING

The Tribunal rules that, no claim having been made to the Board of Trustees and accordingly, there being no decision thereof, it has no jurisdiction pursuant to Schedule section 16(3).

TRAVEL INDUSTRY ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 509

IN THE MATTER OF the decision of the Board of Trustees made pursuant to Section 16(1) of the Schedule to Revised Regulation of Ontario 938 under the Travel Industry Act.

Determining certain claims not eligible for payment

AND IN THE MATTER OF a requirement for a hearing respecting the said decision by

FLORENCE LOWES

Claimant

and

BOARD OF TRUSTEES APPOINTED UNDER SECTION 5 OF THE SCHEDULE

Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Helen J. Morningstar, Member
J. Gordon Alexander, Member

Upon the matter coming before the Commercial Registration Appeal Tribunal commencing November 16, 1981, in the presence of:

Neil Smitheman and Samuel R. Rickett,
counsel for the Claimant

Michael D. Lipton, Q.C., counsel for the
Respondent

HEARING November 16, 17, 20, and 30, 1981

DATES: December 15, 16, and 17, 1981
February 1, 2, 9 and 22, 1982

RULING RE REQUEST FOR HEARING

The Tribunal rules that, no claim having been made to the Board of Trustees and accordingly, there being no decision thereof, it has no jurisdiction pursuant to Schedule Section 16(3).

TRAVEL INDUSTRY ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 509

IN THE MATTER OF the decisions of the Board of Trustees made pursuant to Section 16(1) of the Schedule to Revised Regulation of Ontario 938 under the Travel Industry Act.

Determining certain claims not eligible for payment

AND IN THE MATTER OF a requirements for hearings respecting the said decisions by

MRS. R.M. BARR
MRS. KATHLEEN GROOM

Claimants

and

BOARD OF TRUSTEES APPOINTED UNDER SECTION 5 OF THE SCHEDULE

Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Helen J. Morningstar, Member
J. Gordon Alexander, Member

Upon the matter coming before the Commercial Registration Appeal Tribunal commencing November 16, 1981, in the presence of:

Neil Smitheman and Samuel R. Rickett,
counsel for the Claimants

Michael D. Lipton, Q.C., counsel for the
Respondent

HEARING November 16, 17, 20, and 30, 1981
DATES: December 15, 16, and 17, 1981
February 1, 2, 9 and 22, 1982

DECISION AND ORDER

There being no evidence before the Tribunal to support the claims, BY VIRTUE OF THE AUTHORITY vested in it under Section 16(3) of the Schedule to Revised Regulation 938 under the Travel Industry Act

The Tribunal refuses to allow the claims.

LAWSON McKAY TOURS

APPEAL FROM THE DECISIONS OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT DETERMINING THE CLAIMS
OF THE FOLLOWING CLAIMANTS

TO BE NOT ELIGIBLE FOR PAYMENT:

DOROTHY ARMSTRONG
THE REV. & MRS. T. M. BAILEY
MRS. KATHLEEN BAILEY
MRS. EDITH CLARK
DR. & MRS. GEORGE CLARKE
MRS. J.D. CLEGHORN
MRS. MARGARET COLLETT
REV. & MRS. JOHN CRUICKSHANK
REV. & MRS. GORDON CUNNINGHAM
MISS LUCY DICK
MISS ELSIE DROVER
MRS. M. GERTRUDE GRANT
MISS HELEN I. GREEN
MISS ELLA G. HARRIS
MISS MOLLIE HEDRICK
MRS. FLORENCE JAMES
MRS. MAXINE KRICK
MR. W. R. MARSHALL
MRS. MARJORIE MCCLEMENS
MRS. MARION MCEWEN
MISS EDNA MORRELL
MISS EVELYN MORRIS
MS. HELEN L. MUDDIMAN
MRS. HAZEL I. MURRAY
MRS. DOROTHY NEAL
MRS. JEAN NEWTON
MRS. EVELYN PATON
MISS ANNE C. PECKOVER
MR. & MRS. DONALD PEPPER
MRS. MARY RODGERS
MISS EDNA M. ROSEWELL
MISS CATHERINE SACHS
MRS. SHARON SMITH

MISS AUDREY SPENCER
 MRS. EDITH STEPHENSON
 MISS MARION J. THOMPSON
 MR. & MRS. CHARLES A. TOLL
 MRS. E. C. TRELEAVEN
 MISS CATHERINE WATSON
 MISS STELLA WILLOX

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
 HELEN J. MORNINGSTAR, MEMBER
 J. GORDON ALEXANDER, MEMBER

COUNSEL: GEOFF CAUCHI, representing Mrs. Sharon Smith
 NEAL SMITHEMAN and SAMUEL R. RICKETT representing
 ALL OTHER CLAIMANTS

MICHAEL D. LIPTON, Q.C., representing the
 Respondent

HEARING November 16, 17, 20, and 30, 1981
 DATES: December 15, 16, and 17, 1981
 February 1, 2, 9 and 22, 1982

REASONS FOR DECISION AND ORDER

Lawson McKay Tours Limited (hereinafter referred to as Lawson McKay) of Toronto was registered under the Travel Industry Act, as a "travel wholesaler" commencing August 27, 1975 until the 6th of April, 1981 when pursuant to section 6(7), the Registrar cancelled the registration upon the request in writing of the registrant for voluntary termination. Phillip E. Murch (Murch) and Barbara Cairns (Cairns) were employees of Lawson McKay.

The said Corporation was a participant in the compensation fund from September 30th, 1975 up to April 6th, 1981. Kenneth Lawson (hereinafter referred to as Lawson) was President of the said Corporation.

Torbay Travel Centre Inc. (hereinafter referred to as Torbay) of Hamilton, Ontario, is registered under the Travel Industry Act as a "travel agent". Jane Hamilton (hereinafter referred to as Hamilton) is operator of Torbay.

The Rev. Dr. John A. Johnston (hereinafter referred to as Rev. Johnston) for 15 years has been senior Minister of MacNab Street Presbyterian Church in Hamilton (congregation and members hereinafter referred to as MacNab). He has had a career of some breadth within the Church generally and the Presbyterian Church specifically, acting in a leadership capacity in many areas. Currently a special activity is as Chairman, China Task Force, Board of World Mission (B.W.M.). (see Exhibit #20). Andrew Johnston is his son.

For some years, Rev. Johnston with the authorization of the kirk session, has arranged and conducted tours abroad (Bermuda, Israel, Greece) in conjunction with local travel agents and sometime Swissair, as one of the activities of MacNab for members and their friends.

In late 1979 and early 1980, the idea surfaced and was placed before MacNab of a trip to the Orient to be Church and religion oriented. Through the months that followed by meetings and newsletters the itinerary was developed; by early 1981 all the related details were planned and finalized.

In the course of the consideration of the project, Rev. Johnston contacted Thomas Cook and subsequently Lawson McKay to establish ultimately with the latter the arrangements for and cost of two tours - one a direct trip to and within China ("Lights of the Orient"), the other a round the world tour ("Lights of the East") meeting up with the first within China. Rev. Johnston's goal was to organize "the best tour as inexpensive as possible."

As the concept of the round the world trip emerged Rev. Johnston contacted Swissair representative Evelyn Swan with whom he had dealings in the past and established ultimately that Swissair would provide the air transportation through Torbay. To his query who would best develop the trip, the suggestion was made that he contact Lawson McKay because they had developed an expertise in trips to the Orient. On April 30th, Rev. Johnston, accompanied by Swan, attended upon Lawson McKay and had a meeting with Murch, Manager of Tour Planning who had followed up an earlier enquiry of Swan.

By letter of May 9th, 1980, the discussion was confirmed and a preliminary itinerary with a quote for the round the world trip (Lights of the East) was given (33 days without a Lawson McKay escort - approx. - \$4,100 Canadian - \$200.00 additional with an escort). Rev. Johnston was advised

that "upon acceptance of the quotes already given we require a deposit of \$1,000 Canadian of which \$500 is non-refundable, should the group not materialize." A quote of \$3,295 was given for the China (Lights of the Orient) trip. Lawson McKay was to attend to the basic itinerary. Rev. Johnston was to add additional items, e.g. visits to missions, etc.

The costing of the trips (see Exhibits #19 and #33 of February 23, 1981) included the following expense items:

	<u>Round the World</u>	<u>Orient</u>
Escort Costs	(Cdn)\$150.00	(Cdn)\$154.80
Departure taxes	(Cdn)\$40.20	(Cdn)\$ 28.20
Bag, Pin, Wallet	(Cdn)\$15.60	(Cdn)\$ 15.60
Ad. Money (for gifts)	(Cdn)\$20.00	(Cdn)\$ 20.00

In the initial stages of the organization of the tour(s), and as reported by Rev. Johnston on May 16th, 1980 (Exhibit #28c) 33 persons paid \$35.00 (\$10.00 and \$25.00) to Rev. Johnston as "a mark of interest", "earnest"; \$1,000.00 made up of such payments was paid over on June 29th, 1980 by him to Lawson McKay (see Exhibit #22). Payors of \$35.00 were to receive credit therefor if the trip(s) were proceeded with. The Tribunal finds that the payors were aware that their sums were being paid to Lawson McKay to meet its requirement.

After the land arrangements had been established with Lawson McKay, at their advice, upon the direction of Rev. Johnston, the matter was referred to Torbay (as a travel agent) - with which Rev. Johnston had separately arranged for the air transportation (after shopping around) - for the collection of monies for the land arrangements to be forwarded to Lawson McKay. No commission was to be payable to Torbay in respect of the latter. By arrangement of Rev. Johnston with Lawson McKay, there were to be provided three free "trips" - one for Rev. Johnston, one for his son Andrew (replacing Mrs. Johnston) and one for Rev. E.H. Johnston. Each was to act in the capacity of a tour escort.

As preparations proceeded, publicity was given to the tours and as a result others (friends and relatives of McNab and other members of the Presbyterian Church) participated.

A comprehensive brochure was produced by Rev. Johnston for the 'Lights of the East' (round the world trip) (Exhibit #23) on a blank shell (with coloured pictures) provided by Swissair. In the ordinary course, such a brochure is prepared by a travel wholesaler, and on occasion by a travel agent - not by a tour organizer. Rev. Johnston arranged for the prose, and printing and paid therefor. By the time the brochure was distributed, the round the world tour participants had been largely determined and there was no need of such a brochure as incentive publicity.

In the November/December 1980 edition of "Mission Update", a publication of the Board of World Missions, Presbyterian Church in Canada, there is a boxed notice (Exhibit 39) inserted by Dr. Johnston. Though in appearance an 'ad', it could be taken as a notice, or even an article.

PRESBYTERIAN TOUR TO CHINA AND THE FAR EAST

In May, 1981, a group of Canadian Presbyterians will visit China, Hong Kong, Japan and Taiwan on a first-class tour, with special opportunities to see what the Christian Church is doing in these countries. One part of the group will go around the world, stop in India and take 34 days. The other part will go directly to China and join the first group on a shorter 20-day tour.

The tour will be led by the Rev. Dr. John Alexander Johnston of MacNab Street Presbyterian Church in Hamilton and is promoted by the China Task Force of the Board of World Mission.

For more information please write to:

Rev. J.A. Johnston,
147 Chedoke Ave.,
Hamilton, Ontario L1P 4P2,
or call 416-528-2730

As a result of this notice and word of mouth communication, some claimants became aware of the tours and communicated with Rev. Johnston with respect thereto, receiving directly or indirectly, the necessary information by newsletters, letters, telephone, etc. (see e.g. Exhibit 93 - letter to Cunningham of Rocky Mountain House, Alberta (Exhibit 28x))

Initial tour participants began paying \$200.00 additional deposits; new participants in the tours began to pay deposits of \$235.00; some paid additional deposits of \$1,000.00, to Torbay which forwarded the same to Lawson McKay (see 32(a) of December 15, 1980. 32(b) of January 14, 1981, and 32(c) of February 24th, 1981). In three instances (including Cleghorn and Smith) the \$235.00 was paid by cheques to Rev. Johnston who paid the same to Torbay. During this period, some participants directed queries to, and discussed matters with Torbay.

There is a letter dated December 9th, 1980 from Hamilton (Torbay) to a tour participant acknowledging receipt of her deposit and cancellation insurance payments. She states:

"From time to time you will receive a letter from the Rev. Johnston. This will keep you informed on everything and he will be telling you when final payment will be due, flight times, etc. This is his "show" so you will be getting all your information from him."

Sometime prior to February 1981, Torbay and Lawson McKay agreed that monies in respect of land arrangements were thereafter to be paid direct by participants to Lawson McKay since Torbay was not getting commission for this work.

During this period, general enquiries by Rev. Johnston regarding cancellation insurance resulted in a provision of the same by Lawson McKay at a negotiated group rate of \$60.00 per person to be applied for by participants to Torbay which was paid a commission in respect thereof.

The shift in payment of monies from Torbay to Lawson McKay was accepted without question by the claimants. They knew that Lawson McKay was involved in the arrangements (see Exhibit #28d) for the tour(s) and perceived no distinction in roles, nor had they any awareness that a view was generally held in the industry that the roles were distinct, and that different consequences would follow from dealing with one as compared with dealing with the other.

On February 2nd, 1981 (Exhibit #76) Lawson McKay communicated by letter with the tour participants with respect to visa requirements, and travel documentation.

Throughout the whole period of arrangement, the claimants acted in conjunction with and through Rev. Johnston with Torbay and Lawson McKay. He was the maker of enquiries and recipient of information, the proposer of ideas, the arbiter of consensus; he instructed agencies to implement the consensus. He got the tour together. He fully performed the initial role of "tour organizer", tour co-ordinator", "tour leader", and he was to be "tour director". His communications and arranging for talks with slides by missionaries, his answering of enquiries, etc. led one person to describe him as 'teacher'. Another described him as a "shepherd of a flock". He was the focal point - the 'liaison', 'intermediary'. Concurrently, he promoted the tour and stimulated interest. Generally, all that tour participants had to do was express views, and submit their payments as directed.

It was a "personally designed" tour(s).

Early in 1981, all matters had been finalized; further deposits and the balance of payments in accordance with final invoices from Lawson McKay had been made.

On or about the 8th of April, 1981, the Canadian Imperial Bank of Commerce acting under a general security agreement (in a form similar to Exhibit #15) placed Lawson McKay in "receivership" appointing Price, Waterhouse as receivers (Exhibit #16). The action was taken by reason of the failure of Lawson McKay to pay, when demanded on April 8, an indebtedness of \$261,497.81 to the Bank evidenced by 15 promissory notes issued on various dates (see Exhibit #14) during the period February 26th, 1981 to April 3rd, 1981 for sums ranging from \$5,000.00 (5) to \$85,000.00 (1).

The Receiver took possession of the assets and payments of Lawson McKay at 390 Bay Street and changed the locks. The business just prior to the receivership had to all intents and purposes been discontinued. Services of employees had been terminated as of March 31st. Creditors of Lawson McKay were notified.

An attempt was made by the receiver to use his good offices to "salvage" the tours through the medium of another travel agent but it was not successful. The payment deadline for land arrangements for China was April 20th and this was not met.

On or about the 20th April 1981, claimants were apprised by Rev. Johnston after notification by the Receiver that the tour(s) would not proceed - a copy of the letter to Rev. Johnston (Exhibit #24) went to the solicitors for Lawson McKay.

During this period (April 14th), there is a letter (Exhibit #42) to a claimant on the letterhead of P. Lawson Travel signed by Cairns who had earlier, as an employee of Lawson McKay, been involved in the McNab arrangements. Her letter states inter alia "...as Lawson McKay Tours Ltd. has now ceased operation" and sets out procedures for claiming against the Compensation Fund.

On or about the 11th of May, 1981, Lawson McKay over the signature of Lawson wrote a letter (Exhibit #25) to all members of the McNab Tour Group as an apology "for the inconvenience and suffering caused to you by the cancellation of the tour and the failure of the Compensation Board to honour your claims for a refund."

Mr. Huizingh testifying on behalf of the receiver, stated his estimate of \$150,000 shortfall to the bank; he believed there would be nothing available for unsecured creditors and expressed his opinion that Lawson McKay was insolvent. He stated there were no assets available to cover the cost of the travel services engaged by McNab.

After the issuance to and receipt from and examination of the claim forms submitted by the claimants herein, the Board of Trustees under the Travel Industry Act, 1974 issued a Notice of Decision stating:

"..whereas under Section 1(e) of The Travel Industry Act, 1974, states:

"'travel agent' means a person who carries on the business of selling to the public travel services provided by another person;"

therefore, a claim from a member of the public for travel services purchased from a travel wholesaler will not be entertained and is not eligible for payment from the Compensation Fund."

Counsel for the Respondent in a letter prior to the hearing stated the main issue as follows:

"Can a member of the public have a valid claim under Section 15(1) of the schedule under the Travel Industry Act against a registered travel wholesaler;"

The specific question before the Tribunal is, "Is the claimant entitled to a refund." By virtue of the Travel Industry Act, the answer must be found under the provisions relating to CLAIMS.

With the exception of an oblique reference to the Compensation Fund in section 13 dealing with liability, the only provision in the Act with respect to the Compensation Fund is under section 26:

"The Lieutenant Governor in Council may make regulations."

.....

(j) requiring and governing the establishment and maintenance of compensation funds in trust by travel agents and travel wholesalers and the form and terms of the trust;"

The "Terms of Compensation Fund" are set out in a Schedule to Ontario Regulation 367/75.

In section 14(1) of the Schedule it is stated:

"...and all such money and income shall constitute the fund to be dealt with and distributed in accordance with this Schedule."

The Tribunal is of the opinion that the section relevant to the resolution of the issues herein is set out in section 15 of the Schedule as follows:

"15-(1) Subject to subsection 2, the fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused, after demand or is unable to pay, and which claims meet the following requirements.

A client who has made payment for travel services to a participant in Ontario and who has not received the travel services contracted for, is entitled to claim for a refund of moneys so paid to the extent that such services are not so provided and after he has made a demand for payment from a participant which the participant has refused without legal justification to pay or is unable to pay by reasons of bankruptcy or insolvency....."

The answer to the question set out above must be found under the provisions of the Regulations. The exact specific question to be decided by the Tribunal is:

Is the claimant entitled to claim for a refund for money by virtue of the above provisions relating to CLAIMS?

The 'preamble' of Section 15(1) sets out the principles but the subparagraphs set out the requirements. Each claim requires an examination whether it meets the requirements set forth. It is noted that the requirements are not set out as specifics but in a generalized form.

The Tribunal has had occasion to rule on the interpretation of the various requirements (see Strand Holidays decision released November 10, 1981). The Tribunal reiterates its opinions therein stated:

'A client'

It is not clear whether there was intended that a relationship exist with a participant as a prerequisite or whether the term is a general one to delineate one party to a transaction.

The Tribunal is of the opinion that the term is not one of art but in this context is the same as the term 'customer', i.e. one who purchases goods from another. There may be an element in certain situations of the engagement of the professional advice or services of another. The Tribunal is further of the opinion that the characteristics of the party are irrelevant and that no direct contact is necessary to a party being a client. The guide to a determination of who is a 'client' is whether the person was a party to a direct contract for travel services.

The Tribunal is of the opinion that if any special meaning was to be given to the term client, especially one of limitation, it would have been expressly provided for by definition in section 1 of the Schedule.

At the close of the hearing, counsel for the Respondent submitted extensive argument that the primary issue was a determination whether Rev. Johnston was carrying on in the manner of a travel agent by performing acts of a travel agent, and the effect thereof. It was maintained by the Counsel that the claimants had dealt with an unregistered travel agent (namely Rev. Johnston) and that he was not a participant in the Compensation fund. Re-stated the determination should be that the claimants were clients of the Rev. Johnston and not of a participant under the Act, and accordingly not entitled under the Compensation fund provisions

Counsel for the Respondent argued that the Rev. Johnston came within the meaning of section 3 of the Travel Industry Act, namely:

"no person shall act.....as a travel agent....unless he is registered...."

In support, counsel meticulously recited 17 different acts by Rev. Johnston, which acts were normally performed by a travel agent. The acts of Rev. Johnston are not in dispute, and they are in fact acts performed by travel agents.

However, the Tribunal is of the opinion that such acts are not the prerogative of travel agents, for there is no prohibition of others in respect of such acts. The prohibition is stated in section 3. The specific issue is delineated when the definition of a travel agent (Section 1(e)) is incorporated into Section 3, so that the prohibition may be stated as follows:

No person shall act....as a person who carries on the business of selling to the public travel services provided by another person....

The key factor then is whether the Rev. Johnston carried on the business of selling to the public travel services provided by another person.

The meaning of "carrying on business" was dealt with by the Court of Appeal though in a different context in Re Pszon (1946) O.R. 229 in a citation by Mr. Justice Laidlaw to show what constitutes "carrying on business". He stated, "the word 'business' is of wider import than 'trade'. In Re a debtor [1927] 1 Ch. 97 at 105.

As used in various statutes, it involves at least three elements:

- (1) the occupation of time, attention and labour;
- (2) the incurring of liabilities to other persons; and
- (3) the purpose of livelihood or profit.

....to carry on business he must give attentions , for the maintenance or furtherance of the undertaking, and devote time to the accomplishment of its objects. He must also be in such relation to the public that he may be held liable to others. The liabilities must be such as to be referable to the carrying on of the enterprise.

Finally, it is an essential element of carrying on business that the purpose of the engagement is for a livelihood or profit. If an enterprise is not conducted as a means to accomplish that object it does not come within the ordinary meaning of the term "business".

There is no doubt that the activities with respect to the trips involved on the part of Rev. Johnston, the expenditure of a great deal of time, attention and labour. However, the Tribunal is of the opinion that the second element: "the incurring of liabilities to other persons" is lacking. Though Rev. Johnston was an initiator and made all relevant enquiries and was an arranger, he at all times was taking the actions on behalf of the claimants to whom he never incurred any obligation and, who at no time regarded him as incurring any liability or obligation to them. He was in fact a tour co-ordinator on behalf of a group which described him as above. Once decisions had been finalized by way of commitment to the tour, all claimants were aware that the agencies that were involved were Torbay, and Lawson McKay.

The Tribunal finds that the Rev. Johnston acted only as a tour organizer (leader), as is often the case with special interest group trips. It would appear to be common practice within the industry that in respect of special interest

group trips there be a figure-head. The actions of that figure-head can in practice be minimal (e.g. restricted to being a contact) or they can be as extensive as those (17) of the Rev. Johnston. Indeed, it would appear that the total activity of Rev. Johnston exceeded the kind of effort which could in the ordinary course be expected from a travel agent. The seeking out of information, the provision of background for trip participants, the amount of communication, oral and in writing with individuals and with groups, the precaution even to the extent of a provision of a first aid health kit, left nothing to be desired so far as the planning, development and costing. It is important to note that, as the Tribunal finds, Rev. Johnston did not execute the provision of any travel service. Further the Tribunal finds that 'promotion', the 'stimulating of interest' as performed by Rev. Johnston are not equivalent to the "business of selling" within the meaning of section 1(e).

The two trips planned were not ordinary tours. Rev. Johnston brought to bear years of knowledge and contacts to develop a special "religious" tour which indeed had the potential of a unique experience for the trip participants. Many of his actions were adjuncts to what a travel agent or travel wholesaler, would bring to a group tour.

The Tribunal finds that the claimants were not clients of Rev. Johnston.

Counsel for the Respondent stressed the unfavourable consequences which the industry and public might have to bear if the activities of Rev. Johnston were to be found to be other than in contravention of Section 3, and if the claims were found not barred by reason thereof. The Tribunal is of the opinion that if safeguards are necessary (as they might well be) in respect of such activities, those safeguards must be clearly provided for within the Act and Regulations.

The Tribunal finds that the payments to Lawson McKay and the acceptance of Lawson McKay of the payments constitutes the establishment of the relationship of "client" by each of the claimants.

The Tribunal finds that each of the claimants herein is a client under the meaning of section 15(1).

'who has made payment to a participant'.

The ultimate payment of the monies to Lawson McKay set out in Exhibit #13(b) are undisputed.

With respect to the payment of \$35.00 by claimants (Exhibit #21) to Rev. Johnston, the Tribunal finds that of these, \$1,000.00 was paid by him on behalf of the payors to Lawson McKay. In this regard, the Tribunal notes the waiver of Dorothy Armstrong and Kathleen Bailey of the sum of \$35.00 each, and Rev. Bailey of the sum of \$15.00 paid to Rev. Johnston.

With respect to the sums paid (\$200.00, \$235.00, and \$1,000.00) by certain claimants to Torbay and subsequently remitted by Torbay to Lawson McKay, the Tribunal finds that these sums were paid to Lawson McKay at its behest, and that balances owing were paid direct to Lawson McKay also at its behest.

In regard to the delivery by Hazel Murray to Torbay of the amounts owing in respect of the gift of trips to Rev. and Mrs. Cruikshank, the Tribunal finds that such when received was on behalf of Rev. and Mrs. Cruikshank and was equivalent to payment by them (see letter 32a, items #141, #15 Lights of the Orient and invoice #2008)

Counsel for the Respondent argued that of the sum of \$1,000.00 paid by Rev. Johnston to Lawson McKay, \$500.00 was described as non-refundable and therefore excluded by Schedule Section 15(2) Regulation 938. The Tribunal finds that the non-refundability was qualified "should the foregoing not materialize"; which qualification did not occur, so that Section 15(2) is not applicable (see Exhibit #29).

The Tribunal finds that the sum of \$50.00 (set out in Exhibit #29) was declared as a further non-refundable deposit to be collected "...3 months after the acceptance of our quote." A reading of Exhibits #27 and #31 indicate that the said sum is to be taken as included in the further deposit of \$200.00 made by tour members. The Tribunal finds that the \$50.00 comes within the exclusion of Schedule Section 15(2) and that claimants are accordingly not entitled in respect of the said \$50.00.

The Tribunal finds that each of the claimants made payment within the meaning of section 15(1).

'for travel services'

Travel services are defined in section 1 of the Act:

- (g) "travel service" means transportation, sleeping accommodation or other service for the use of a traveller, tourist or sightseer;"

The Tribunal is of the opinion that "other service" must be interpreted on the basis of being a direct element of travel and not an indirect element.

Accordingly, the Tribunal finds:

"travel service" includes all the items set out in the cost sheets (Exhibits 19 - 33) excluding:

- .taxes of all types - port, airport,
departure, hotel, etc.
- .charges for bag, pin, wallet

and "travel services" excludes:

- .cancellation insurance
- .visa fees

The Tribunal is of the opinion that 'travel service' includes 'escort costs' and the term is not restricted by the ejusdem generis rule to matters akin to transportation and sleeping accommodation. A service for the use of a '...tourist or sightseer' can be quite unrelated to the two specifics.

The Tribunal finds that all the services claimed for, with the exception of those which come within the exclusions referred to above, are a travel service within the meaning of the section.

'to a participant':

Participant is defined in the schedule, Section 1

- (f) "participant" means any travel agent or travel wholesaler who is a subscriber to the fund with the approval of the Registrar.

It is undisputed that Lawson McKay is a "travel wholesaler who is a subscriber to the fund with the approval of the Registrar". Ergo, the Tribunal finds that Lawson McKay is a participant within the context of section 15(1). The meaning of the Statute is plain; any person reading the sections would come to that conclusion - and understanding that an entitlement would not be excluded because the travel wholesaler is not a registered travel agent.

Counsel for the Respondent then re-stated as the main issue, that the Tribunal decision in Re Strand (issued 10 November 1981) notwithstanding, Lawson McKay should not be considered as a participant for the purposes of Regulation Schedule 15(1) of Regulation 938

It was argued that participant should be interpreted as being a participant who is a travel agent. The Tribunal does not agree - the term stands alone. If the intent were as argued, it would have been simple enough to have added the words "who is a travel agent" as a qualification just as it is used in section 15(2) and 15(3). The regulation 938 is replete with the use of the term 'participant' without qualification and so used patently includes travel agent and travel wholesaler. (See for example Schedule Sections 21 and 22.)

The legislation is consumer protection and the Tribunal is of the opinion that where doubts exist as to an interpretation, no interpretation should be made which excludes protection. Provisions of exclusions should be clear. Indeed the clarity in this provision is - that there is no qualification - i.e. no exclusion. The mischief legislated against is loss to clients who contract for travel services and do not receive them.

Counsel for the Respondent also stressed the ramifications of such a decision and expressed concerns with respect thereto. For example, he stressed the requirement in respect of travel agents of receipts to be issued - a requirement which is not made of travel wholesalers. The Tribunal is of the opinion that just as an amendment was made in 1980 with respect to travel agents, such can be done, in respect of travel wholesalers. Such can be done in respect of other matters. It is the obligation of the Tribunal to apply the Statute and Regulations as they are; as they should be or as desired - comes within the ambit of the legislature and the Lt. Governor in Council.

'in Ontario'

The locale is not in dispute in these claims.

'and who has not received the travel services contracted for' is entitled to claim for a refund of moneys so paid to the extent only that such services are not so provided'

Non receipt of the services is not in dispute in these claims, nor is the extent of services not provided for.

'and after he has made a demand for payment from a participant'

The Tribunal finds that the actions of the claimants in filing claims under the circumstances herein is equivalent to the 'demand' required

'which the participant has refused to pay'

The Tribunal finds that the actions of Lawson McKay were refusal to pay. They are exemplified in its 'ceasing trading', and the direction of Lawson to the Compensation fund.

'without legal justification'

The Tribunal is of the opinion that under the circumstances of the Lawson McKay default there is no onus on the claimant to prove lack of legal justification. Failure to pay without anything more can be taken to be failure to pay without legal justification

'or is unable to pay by reason of bankruptcy or insolvency'

The Tribunal is of the opinion that all claimants also meet this alternate requirement. The Tribunal finds that Lawson McKay is unable to pay by reason of insolvency. The Tribunal is of the opinion that the term is not to be interpreted in a technical sense. That Lawson McKay does not appear in the Records of the Registrar in Bankruptcy (Exhibit 18) and that there are no writs of execution, etc. in the hands of the Sheriff (Exhibit 17) is not proof that Lawson McKay is not insolvent. There is abundant evidence that Lawson McKay is insolvent in a general sense in that it is unable to meet its debts or obligations or discharge its liabilities in the ordinary course of business as they become due. Its

indebtedness to the bank; its lack of assets far and beyond that indebtedness are clear indications. The actions of the receiver's representative are also indications; his testimony leaves no doubt. It would appear that Lawson McKay 'elected' to go the route of receivership rather than that of bankruptcy.

The submission was made to the Tribunal that there should be a recourse by all claimants to the Small Claims Court prior to a claim from the Compensation Fund as if the fund were one of last resort. The Tribunal is of the opinion that this position is ill-founded. If such were the intent there would have been a requirement for an unsatisfied judgment. In any event, the Tribunal is of the opinion that any action related to Lawson McKay under the circumstances of the present claims would have been an exercise in futility not imposed by the section. In this respect, the Tribunal is of the opinion that the Tribunal decision in Re Frank Hargarten (issued 18 February 1982) is to be distinguished on the facts; the registration had been terminated at the time of payment.

The matter of the claim in Re Vanda Beauty Counselor (CRAT Vol. 7, page 79) cited by counsel for the Board, can be distinguished on several grounds - the main one being that Excelsior with which the dealings had been made "is not a registered travel wholesaler nor a participant in the Compensation Fund at the time the Applicant paid the \$1,000 claimed."

The Tribunal is of the opinion that the requirements to be met by each claimant must be viewed in the light of the total situation of the participant and the action by each claimant must be analysed in the reasonable perception by such claimant of the situation.

The Tribunal finds that all claimants have met all the requirements set out in section 15(1) and are entitled to amounts of a refund of monies claimed subject to the specific findings as to exclusions of amounts of items as set out above.

DECISION AND ORDER

The Tribunal allows the claims as set out herein and directs the Board of Trustees to pay to the claimants listed the amounts claimed in Exhibit 13(b) subject to the exclusions set out in the Reasons for Decision and Order; that is, to pay the amounts claimed, less \$50.00 non-refundable deposit, less departure taxes, less charges - bag, etc., less advance money, less cancellation insurance premium and less visa fee.

M. & M. TRAVEL

APPEAL FROM THE DECISION OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT DETERMINING THE CLAIM
OF THE CLAIMANT.

TO BE NOT ELIGIBLE FOR PAYMENT

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
VICTOR MASI, MEMBER

COUNSEL: SHEILA MCKINNEY, agent for the Applicant
MICHAEL D. LIPTON, Q.C., representing the Respondent

HEARING NOVEMBER 19, 1981
DATE:

REASONS FOR DECISION AND ORDER

This is a case where M. & M. Travel, Travel Agents, booked a honeymoon trip for a Mr. Batchelor and his bride. The trip was to start immediately after their wedding. The client paid for it with funds which were given the agent, the present claimant, and then passed along, less the agent's commission, to the travel wholesaler Strand Holidays. Some \$1,537.00 was turned over by the agent to the wholesaler in this way.

Subsequently, the wholesaler announced that the trip it was offering would not take place on the date originally agreed to but on some other date. Batchelor and his bride-to-be could not accept this. They required that the trip which was to be a honeymoon should begin not before the wedding, not the day after the wedding but right immediately after the wedding. The agent, M. & M. Travel operated by Mrs. McKinney agreed. So she cancelled the trip and booked another one from another travel wholesaler, one which would take place on the right date.

Moreover, M. & M. Travel paid for the substituted trip, which was booked in substitution for the Strand trip which was cancelled, and only billed Batchelor for the amount of the excess by which the substituted trip exceeded the cost of the cancelled one.

Up to this point everything was fine with all the parties behaving very well and everybody very happy. In particular Mrs. McKinney and her firm behaved with commendable fairness and graciousness.

It was what happened next that gave rise to the problem which has been set before us.

Having paid for the substituted honeymoon trip at no extra charge to the client, (save as to the excess cost as stated), Mrs. McKinney's firm now found itself entitled to a refund from Strand for the amount advanced to pay for the trip which had been cancelled, an amount in excess of \$1,500.00. The evidence is that a number of telephone calls were made by Mrs. McKinney's office assistants to certain individuals employed at the Strand office but that over a period of about five months from November, 1980 when the Strand trip was cancelled until 4:00 P.M. on April 10, 1981 when Strand ceased to operate as a registered travel wholesaler, no further effort at all was made to collect this substantial amount.

Indeed, M. & M., during the period, actually paid amounts at least double to the amount owing to Strand. These were to cover other and additional trips booked by M. & M. Travel through Strand as part of an ongoing business relationship. As recently as February 17th, 1981 M. & M. paid Strand a sum of some \$2,284.00 without deducting the amount owed by Strand to it, either as a setoff or a contra account

When Strand went out of business in circumstances which indicated that the sum owing M. & M. could not be collected, M. & M. requested that the amount owing be paid as a claim against the Compensation Fund under the Travel Industry Act. This claim was refused on the grounds that it was a business loss and that M. & M. had been insufficiently diligent in attempting to recover it from the firm primarily responsible for its payment.

At this hearing the Tribunal's decision in the Der Travel case which was decided on June 7th of this year, as well as the decision in the case of Carousel Travel Incorporated reported at 1980 C.R.A.T. reports Volume 9, p. 131, were cited. In the Tribunal's view the principles established in those cases are binding upon us, especially the rules we laid down in the case of Der Travel. This fund is not business insurance. It exists to protect the public, not business concerns which may choose to extend credit at their own risk beyond the limits of reasonable prudence.

Accordingly this claim fails and the Trustees' decision to withhold payment of same is by this order upheld.

MANITOBA TRAVEL ASSOCIATION, ET AL
 -BYRON'S TRAVEL SERVICES LTD.
 -CONTINENTAL TRAVEL BUREAU LTD.
 -O'BRIEN TRAVEL SERVICE
 -LH TRAVEL SHOP LTD.
 -MML CLUB SERVICES LTD. (MML TRAVEL AGENCY)
 -MML CLUB SERVICES LTD. (LAMONT TRAVEL AGENCY)
 -THOMAS COOK TRAVEL (CANADA) LTD.

APPEAL FROM DECISIONS OF THE BOARD OF TRUSTEES
 UNDER THE TRAVEL INDUSTRY ACT

REFUSING CLAIMS

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
 HELEN J. MORNINGSTAR, MEMBER
 PETER BONCH, MEMBER

COUNSEL: SAMUEL WILDER, Agent for the Claimants
 MICHAEL D. LIPTON, Q.C., for the Respondent

DATE OF
 HEARING: January 21, 1982

REASONS FOR TRIBUNAL RULING

The Tribunal has ruled that it will at this point hear argument with respect to the point which may be stated as follows:

Whether a travel agent from within the Province of Manitoba who has met all of the requirements can be found to be a client within the meaning of Section 15 (1) paragraph 1 of the Schedule to the Regulations.

The Tribunal is empowered to set its own procedure. There is no doubt that in the ordinary course of a hearing where other requirements would be dealt with in a preliminary fashion, at some point the issue would be raised which would involve the determination of those who are encompassed by the term "client".

The Tribunal is of the opinion that in the interests of the parties under the circumstances as outlined by Mr. Wilder, this be proceeded with at this point.

MANITOBA TRAVEL ASSOCIATION, ET AL
 -BYRON'S TRAVEL SERVICES LTD.
 -CONTINENTAL TRAVEL BUREAU LTD.
 -O'BRIEN TRAVEL SERVICE
 -LH TRAVEL SHOP LTD.
 -MML CLUB SERVICES LTD. (MML TRAVEL AGENCY)
 -MML CLUB SERVICES LTD. (LAMONT TRAVEL AGENCY)
 -THOMAS COOK TRAVEL (CANADA) LTD.)

APPEAL FROM DECISIONS OF THE BOARD OF TRUSTEES
 UNDER THE TRAVEL INDUSTRY ACT

REFUSING CLAIMS

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
 HELEN J. MORNINGSTAR, MEMBER
 PETER BONCH, MEMBER

COUNSEL: SAMUEL WILDER, Agent for the Claimants

MICHAEL D. LIPTON, Q.C., for the Respondent

HEARING

DATE: January 21, 1982

REASONS FOR DECISION AND ORDER

The claimants are travel agencies within the Province of Manitoba but not participants under the Travel Industry Act of Ontario.

The Tribunal has ruled that an issue which must be determined in order that such a claimant succeed, on the assumption that all other requirements have been met, is whether such a claimant comes within the purview of 'client' for the purposes of a claim under Section 15(1)1 of the Schedule to Regulation 938 under the Travel Industry Act.

Section 15 sets out in great detail under what circumstances there is entitlement, and accordingly when payments can be made out of the Compensation Fund. The Tribunal is of the opinion that a claimant to succeed must bring itself within some provision of the Section. The Tribunal is also of the opinion that in its determination it must read all provisions together. The Tribunal is of the

opinion that the claimants herein do not come under the entitlement set out in Section 15(1) paragraph 1, as they do not come within the meaning of 'client'. The entitlement of travel agents has been delineated in Section 15, subsection 2. The matter having been dealt with in one section, if there is a factor which cannot be met (for example in these instances that of being a participant), then the claimants cannot maintain that they can come within the purview of another section. The Tribunal is of the opinion that the entitlement by virtue of Section 15(2) excludes travel agents from entitlement under Section 15(1), and they are not within the meaning of 'client' of that section.

Accordingly, by virtue of the authority vested in it under Section 16 (3) of the Schedule of Regulation 938 under the Travel Industry Act, the Tribunal does not allow the claims herein.

DR. MAHESH MEHTA

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES
APPOINTED UNDER SECTION 5 OF THE SCHEDULE
TO REVISED REGULATIONS OF ONTARIO
UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MARY JANE BINKS RICE, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
JOHN AUSTIN, MEMBER

COUNSEL: DARRYL SHERMAN, representing the Applicant
MICHAEL D. LIPTON, Q.C., representing the Respondent

HEARING
DATE: 21st day of October, 1982

REASONS FOR DECISION AND ORDER

This is a hearing pursuant to Section 15 of the Schedule of Ontario Regulations 938/Revised Regulations of Ontario 1980 as amended to Ontario Regulation 706/81.

The Applicant requested a hearing before the Tribunal after receipt of the decision of The Board of Trustees of The Compensation Fund dated March 3rd, 1978 informing the Applicant that his claim was not eligible for payment under Section 15 (1)(1) as he did not use due care in securing his refund from Sid Travel after his return to Canada.

The facts of this case which were not in dispute are as follows:

The Applicant, Dr. Mahesh Mehta entered into an agreement with Sid Travel for air travel services for a flight itinerary from Toronto to Bombay to New York to Detroit with numerous stops. The evidence shows Dr. Mehta paid \$4,030.00 for these services for himself and his wife. Upon receipt of his tickets for the Toronto to Bombay portion of the trip and a letter directing future issuance of return tickets, Dr. Mehta became concerned about the nature of the return air flight arrangements. He thereupon requested of Sid Travel, a full refund of his payment for tickets issued as requested for the entire trip.

Sid Travel offered a full refund less \$200.00 which was unacceptable to Dr. Mehta. Dr. Mehta did use the issued tickets for travel from Toronto to Bombay. In July 1978 Dr. Mehta received notification that Sid Travel had refunded to him \$1,130.44 Canadian funds, which cheque was in fact deposited to his account by Dr. Mehta's secretary in his absence from the country. Dr. Mehta attempted to return the refund without success. In August 1979 he had a prepaid ticket issued in the amount of \$1,612.30 U.S. funds for travel for himself and his wife to return from Bombay to Detroit. Dr. Mehta seeks from the fund, the sum of \$799.09 which consists of the difference between the refund given which was \$1,130.44 Canadian funds, the additional sum paid for return travel of \$1,612.30 U.S. funds, increased by an exchange rate of 10% which is the amount of \$161.23, a service charge of \$100.00 and \$56.00 cargo cost.

Dr. Mehta submitted his claim to the Fund on November 16th, 1981.

The Tribunal disallows the claim for the following reasons:

- (1) On the basis of the case law, the Tribunal finds the applicant did not diligently pursue his claim, as he must do so to succeed before the Fund nor did he pursue his normal and appropriate legal remedies.
- (2) The Tribunal finds as a fact that travel services were in fact provided by Sid Travel, and that the claim in question is a claim that is based on the cost of the services and such a claim is not permitted by Section 15 of the Regulations

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 16(3) of the Schedule to Revised Regulation 938 under The Travel Industry Act

The Tribunal disallows this claim.

TRAVEL INDUSTRY ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 509

IN THE MATTER OF CLAIMS by
WAYNE R. BROWN, et al. (as listed in Appendix marked "A"
hereto)

AND IN THE MATTER OF DECISIONS of the Board of Trustees
(appointed under Section 5 of the Schedule to Revised
Regulations of Ontario, Regulation 938 under the Travel
Industry Act) under section 16(1) of the Schedule
DETERMINING CLAIMS NOT ELIGIBLE FOR PAYMENT

AND IN THE MATTER OF requirements for a hearing respecting the
said Decisions by :

WAYNE R. BROWN, et al.

Applicants

and

THE BOARD OF TRUSTEES APPOINTED UNDER SECTION 5 OF THE SCHEDULE
Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Watson W. Evans, Member
Margaret Donald, Member

In the presence of:

Samuel R. Rickett, representing the Applicants

Michael D. Lipton, Q.C., representing the Respondent

RULING

Requirements for hearings were made on behalf of certain
claimants (Wayne R. Brown et al.) related to the Associated
Building Industry of Northern California and Professional
Seminar Consultants Limited.

The Tribunal has heard the evidence on behalf of the claims set out in Appendix "A" (i), so related. The matter before the Tribunal at this juncture is the consideration of the adjournment of the balance of the hearings sine die.

There is no provision in the Schedule enabling the Tribunal to hold a hearing similar to what is referred to as class action, nor is there a format for dealing with multiple requests for hearings based on what appear to be somewhat similar circumstances. To date the Tribunal has dealt with such multiple requests on an individual basis though administratively and procedurally simultaneously with certain relevant evidence attested to once and upon request applied generally, (in respect of each hearing) and the hearings of the claimants were so begun and conducted.

The very basis for the existence of the Commercial Registration Appeal Tribunal is to enable citizens to require an independent hearing apart from the consideration by those who have the responsibility of administering relevant legislation. Each claimant has, under the Schedule, an entitlement to a hearing upon a refusal of a claim.

There was probably not contemplated situations that have emerged in recent times leading to multiple claims.

The Tribunal is called upon to exercise its power and discretion to develop suitable procedures in order to ensure that fairness applies in all circumstances. The Tribunal is of the opinion that to insist on a course of action where each claimant must appear at this time to present a claim might deprive individuals from having the hearing provided for.

The Tribunal is of the opinion that it would be a useful procedure to complete the hearings related to the claims that have been heard [as set out in Appendix A (i)] and to adjourn all the other hearings [as set out in Appendix A (ii)] sine die to a date to be set by the Registrar upon 10 days notice.

The Tribunal so orders.

APPENDIX MARKED 'A'

TO THE RULING OF
THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

- i) Douglas H. and K. Caldwell
Arthur Davis Jr.
W.F. Gaeuman
Jack B. and Dona C. Leue

- ii) Wayne R. Brown
Mr. and Mrs. Karney Barberian
Kathie Botieff-Carniglia
Anita and William Botieff
Robert P. Bruce
Frances Finch
Edward and Alice Gabrielson
Mr. and Mrs. Gordon W. Hanson
Robert and Sarah Hall
Bruce G. Huntley
Walter Harrington and Alexander Kulakoff
Charles I. Joens
Fay G. Koretoff
Mr. and Mrs. Harold J. Kreutz
Lloyd and Elizabeth Klein
Elwood J. Leep
John and Jeane Lane
Bradford D. Melton
Lee Marsh
Byrl D. Phelps
Ned K. Ryder
Edward P. Schwafel Engineer Inc.
Mr. and Mrs. Willis G. Schoemaker
J. Boyd Stout
Walter and Zula Springs
Robert E. Towne
Carol Rexroth
James W. Williams
Jack Webb
Paul Baldacci Jr.
Mr. and Mrs. Thomas J. Callan Jr.
W. Edgar Jessup Jr.
Paul and Edwina McDowell
Donald R. Wick

TRAVEL INDUSTRY ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 509

IN THE MATTER OF CLAIMS by
JOHN R. ALMKLOV, et al. (as listed in Appendix marked "B"
hereto)

AND IN THE MATTER OF DECISIONS of the Board of Trustees
(appointed under Section 5 of the Schedule to Revised
Regulations of Ontario, Regulation 938 under the Travel
Industry Act) under section 16(1) of the Schedule
DETERMINING CLAIMS NOT ELIGIBLE FOR PAYMENT

AND IN THE MATTER OF requirements for a hearing respecting the
said Decisions by :

JOHN R. ALMKLOV, et al.

Applicants

and

THE BOARD OF TRUSTEES APPOINTED UNDER SECTION 5 OF THE SCHEDULE
Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Watson W. Evans, Member
Margaret Donald, Member

In the presence of:

Samuel R. Rickett, representing the Applicants

Michael D. Lipton, Q.C., representing the Respondent

RULING

Requirements for hearings were made on behalf of claimants
(John R. Almklov et al.) related to the Medical Society of
Santa Barbara County and Professional Seminar Consultants
Limited.

The Tribunal has heard the evidence on behalf of the claims set out in Appendix "B" (i), so related. The matter before the Tribunal at this juncture is the consideration of the adjournment of the balance of the hearings sine die.

There is no provision in the Schedule enabling the Tribunal to hold a hearing similar to what is referred to as class action, nor is there a format for dealing with multiple requests for hearings based on what appear to be somewhat similar circumstances. To date the Tribunal has dealt with such multiple requests on an individual basis though administratively and procedurally simultaneously with certain relevant evidence attested to once and upon request applied generally, (in respect of each hearing) and the hearings of the claimants were so begun and conducted.

The very basis for the existence of the Commercial Registration Appeal Tribunal is to enable citizens to require an independent hearing apart from the consideration by those who have the responsibility of administering relevant legislation. Each claimant has, under the Schedule, an entitlement to a hearing upon a refusal of a claim.

There was probably not contemplated situations that have emerged in recent times leading to multiple claims.

The Tribunal is called upon to exercise its power and discretion to develop suitable procedures in order to ensure that fairness applies in all circumstances. The Tribunal is of the opinion that to insist on a course of action where each claimant must appear at this time to present a claim might deprive individuals from having the hearing provided for.

The Tribunal is of the opinion that it would be a useful procedure to complete the hearings related to the claims that have been heard [as set out in Appendix B (i) and to adjourn all the other hearings (as set out in Appendix B (ii)) sine die to a date to be set by the Registrar upon 10 days notice.

The Tribunal so orders. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

APPENDIX MARKED 'B'

TO THE RULING OF
THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

- i) Jeannine J. Legler
Dr. and Mrs. Raymond J. Maurer
Gerald L. Severin

- ii) John R. Almklov
Eugene Mironoff
Oscar Auerback
Benjamin B. Banaag
Harry B. Braun
Alfred V. Bateman
Dr. and Mrs. Stephen L. Bland
William Durnin
Mr. and Mrs. William J. Davenport
Joseph M. Farber
Rita Galligan
E.A. Hackie
Edward E. Hildebrand
Mrs. Letarcia G. Hunt

- Nathan Jacobs
Donald E. King
Norton Kolomeyer
Mr. and Mrs. Harper C. Lowe
Lois L. Schwartz
Victor J. Slominski
Dr. and Mrs. Carl Leong
Robert C. Marshall
John D. Meschuk
Helen McClary
Robert M. du Roy
Marvin Rechter
William J. Tibbs
Frank S. Vigil
Frank E. Weagant

TRAVEL INDUSTRY ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 509

IN THE MATTER OF CLAIMS by
DR. & MRS. FRED F. CRUTCHER, et al. (as listed in Appendix
marked "C" hereto)

AND IN THE MATTER OF DECISIONS of the Board of Trustees
(appointed under Section 5 of the Schedule to Revised
Regulations of Ontario, Regulation 938 under the Travel
Industry Act) under section 16(1) of the Schedule
DETERMINING CLAIMS NOT ELIGIBLE FOR PAYMENT

AND IN THE MATTER OF requirements for a hearing respecting the
said Decisions by :

DR. & MRS. FRED F. CRUTCHER, et al.

Applicants

and

THE BOARD OF TRUSTEES APPOINTED UNDER SECTION 5 OF THE SCHEDULE
Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Watson W. Evans, Member
Margaret Donald, Member

In the presence of:

Samuel R. Rickett, representing the Applicants

Michael D. Lipton, Q.C., representing the Respondent

RULING

The Tribunal has considered the matter of the adjournment
of certain hearings required by claimants related to the
Alameda County Dental Society and Professional Seminar
Consultants Limited.

The Tribunal is reiterating its position that the
legislation fundamental to the existence of the Tribunal is the
provision of a hearing by an independent agency. The rules

relating to the procedures of the Tribunal are still in the process of being devised. Those procedures have not been finalized and the general public is not aware of them. In recent times the Tribunal has been confronted with what can be described as "multiple requests for hearings" arising out of what appear to be similar circumstances. It is a coincidence that these particular hearings are part of a set involving three groups of people; the situations are such that the Tribunal could have been confronted with them either at different times or in respect of different circumstances. For example, there could have been some other participant against which multiple claims could be made.

It is fundamental to the legislation (both the Ministry Act and the Travel Industry Act) that the legislature would want to have each claim decided upon on its merits. A great deal of flexibility has been given to this and similar Tribunals in order to obviate technicalities to ensure that so far as possible a party will be able to have an opportunity of stating a case.

The Tribunal is of the opinion that being master of its own procedures, it can on its own initiative adjourn the matter from time to time if it deems it to be necessary for a proper hearing or indeed for a hearing (whatever form it may take). The Tribunal does not believe that on balance the Board of Trustees will be prejudiced in any way. The Tribunal notes that under Section 21 of the Statutory Powers of Procedure Act a hearing may be adjourned from time to time by a Tribunal of its own motion;

Accordingly, the Tribunal will complete the hearings related to the claims that have been heard [as set out in Appendix C (i)] and adjourn all the other hearings [as set out in Appendix (ii)] sine die to a date to be set by the Registrar upon 10 days notice.

The Tribunal so orders.

APPENDIX MARKED 'C'

TO THE RULING OF
THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

i) Dr. and Mrs. Fred F. Crutcher

ii) Stanley and Laverne Krotz
Dr. Russell R. Langenbeck
Dr. and Mrs. Dan W. Peterson

TRAVEL INDUSTRY ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 509

IN THE MATTER OF CLAIMS by
VIOLET CHAPPELL, et al. (as listed in Appendix marked "D"
hereto)

AND IN THE MATTER OF DECISIONS of the Board of Trustees
(appointed under Section 5 of the Schedule to Revised
Regulations of Ontario, Regulation 938 under the Travel
Industry Act) under section 16(1) of the Schedule
DETERMINING CLAIMS NOT ELIGIBLE FOR PAYMENT

AND IN THE MATTER OF requirements for a hearing respecting the
said Decisions by:

VIOLET CHAPPELL, et al.

Applicants

and

THE BOARD OF TRUSTEES APPOINTED UNDER SECTION 5 OF THE SCHEDULE
Respondent

BEFORE:

John Yaremko, Q.C., Chairman
Watson W. Evans, Member
Margaret Donald, Member

Upon the matter coming before the Commercial Registration
Appeal Tribunal the 28th day of July, 1982 in the presence of:

Samuel R. Rickett, representing the Applicants

Michael D. Lipton, Q.C., representing the Respondent

DECISION AND ORDER

Requirements for hearings were made on behalf of certain
claimants (Violet Chappell, et al.) related to the Golden Gate
Nurses Association Inc., and Professional Seminar Consultants
Limited.

There being no evidence before the Tribunal to support the
claims, BY VIRTUE OF THE AUTHORITY vested in it under Section
16(3) of the Schedule to Revised Regulation 938 under the
Travel Industry Act,

The Tribunal refuses to allow the claims set out in Appendix
marked "D".

APPENDIX MARKED 'D'

TO THE RULING OF
THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

Mrs. Violet Chappell
Miss K. Coleman
Lois L. Dunn
Phyllis Ann Elb
Ralph E. Henderson
Elita L. Holloway
Marie Martinex
Mr. & Mrs. William H. Meyer
Jeanne Murphy
Mrs. Mae K. Oba
Ann Simon
Katharine Sylvester

TRAVEL INDUSTRY ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 509

IN THE MATTER OF the decision of the Board of Trustees made pursuant to Section 16(1) of the Schedule to Revised Regulation of Ontario 938 under the Travel Industry Act.

AND IN THE MATTER OF a requirement for a hearing respecting the said decision by

JUDY AYERS
MARY MARGARET BRUN
PAULA CAROL
JACQUELINE CARNEY
CHERYL J. CRIST
NORA CUTHBERT
KATHLEEN FLYNN
ANN MARIE GATTA
JEANNE JACKSON
PEGGY KELLY
MARGARET KOSTEK
SHARON MARIE LICKFELD
PATRICIA QUINN
MARY RECKTENWALT
PATRICIA A. STORY
JOY SULLIVAN
DIANE E. WHELAN
DAVID A. GRUPP
LAURIE VANDERWERF
MARY T. DAVIS
ANN M. BROWNE
BOB STORY
FRANCIS W. SULLIVAN JR.
RICHARD J. FISHER
BRIAN MURPHY
MARY KAY ROST
LYNN CONRAD

Claimants

and

BOARD OF TRUSTEES APPOINTED UNDER SECTION 5 OF THE SCHEDULE

Respondent

BEFORE:

John Yaremko, Q.C., Chairman
 Mary Jane Binks Rice. Vice-Chairman as Member
 Lisa Mann, Member

Upon the matter coming before the Commercial Registration Appeal Tribunal on the 8th day of July, 1982, in the presence of:

Michael D. Lipton, Q.C., representing the Respondent

No one appearing for the Claimants

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act R.S.O. 1980, Chapter 484 and under Section 16(3) of the Schedule to Regulation 938 (Revised Regulations of Ontario), the Tribunal determines as follows:

1. The Claimants were given notice of the Appointment for Hearing for July 8th, 1982 as evidenced by Exhibit 6 which contains the further notice:

"...if you do not attend at this hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

2. Upon the Claimants failing to appear to pursue their claims and there being no evidence before the Tribunal to support such claims, the Tribunal does not allow the claims.

394628 ONTARIO LIMITED
(UNITED TRAVELS)

APPEAL FROM THE DECISION OF THE BOARD OF
TRUSTEES UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
KEITH COPPARD, MEMBER

COUNSEL: JOSEPH VARGHESE, its Agent
MICHAEL D. LIPTON, representing the Respondent

HEARING
DATE: October 6th, 1982

REASONS FOR DECISION AND ORDER

This Hearing was called in order to consider an appeal by the claimant 394628 Ontario Limited, United Travels, from a decision by the Respondent, the Board of Trustees appointed under Section 5 of the Schedule pursuant to the Travel Industry Act denying payment to the claimant of its claim made upon the Travel Fund, established pursuant to the said Act for compensation in the sum of \$2,434.66 on the grounds that the said claim was not a valid claim because it was a trade debt. This decision appealed from as aforesaid, was communicated by the Respondent to the Claimant in a letter dated October 27, 1981.

Further particulars which are not in dispute, are as follows:

In December 1976 certain Airline Tickets were issued by the claimant, United Travels to Sid Travel Agency - tickets for travel by five different persons to destinations such as Karachi, Lahore, Paris Damascus, and Calcutta. The value of these was \$4,362.42 which was paid on or about December 22nd, 1976 partly by credit card and partly, to the extent of the sum of \$2, 434.66 by means of a cheque. The value of this cheque passed.

Later, on or about January 11, 1977, the said cheque (which had been deposited by the claimant on December 28, 1976) which had been the subject of a stop payment order by the maker of it and had therefore been dishonoured by the bank upon which it had been drawn, was returned to United Travels.

(It appears that an invoice in respect of this transaction was duly given on or about December 22, 1976.)

United Travels was very unhappy to receive back the cheque referred to, dishonoured, and commenced an action in the County Court in the Judicial District of York for recovery of the sum of \$2,434.66 as aforesaid.

That action failed to effect its intended purpose, as we understand it, because the defendant went into bankruptcy.

At all events, having apparently exhausted all alternative means of recovering the amount due, the claimant decided to move against the Fund for the said sum of \$2,434.66 and this claim has been refused as we have just stated.

Counsel for the Respondent at the outset of the Hearing placed certain Preliminary Objections before the Tribunal. The Tribunal agreed to hear these and when they had been made, the representative of the claimant, to wit, its president, Mr. Varghese, responded to them.

To support such Preliminary Objections three certificates were entered in evidence as Exhibits 9, 10 and 11. These are exhibits over the signature of R. A. Simpson, Director of the Consumer Protection Division of the Ministry of Consumer and Commercial Relations. The first of them relates to Sid Travel Agency and reads in part:

Pursuant to Section 26 of the Travel Industry Act..... I hereby certify: 1. That our records were searched on October 4, 1982. 2. That this search revealed that the above-named, that is to say Sid Travel Agency was registered as a sole proprietor under the Travel Industry Act, as travel agent, effective November 24, 1975 and terminated April 29, 1980.

It will be noted that there is no indication that Sid Travel Agency is a travel wholesaler and indeed the Tribunal takes it that Sid Travel Agency was not at any relevant time a travel wholesaler.

The second of these certificates entered as Exhibit 10 again over the signature of Mr. R. A. Simpson and bearing date the 5th of October 1982 certifies that a search made on October 4th, 1982 revealed that United Travels was registered as a corporation under the Travel Industry Act as a travel agent effective July 28th, 1975 and was terminated August 1st, 1981. The third of these certificates entered as Exhibit 11 over the signature of Mr. Simpson and bearing again the date October 5th, 1982 indicates that a search of records was made on October 4th, 1982 and that that search revealed that United Travels was registered as a corporation under the Travel Industry Act as a travel wholesaler effective April 10th, 1979 to August 31st, 1981.

The prima facie effect of these certificates which has not been rebutted or challenged is to establish that at the time of the transaction in question, namely December 1976, Sid Travel was not a travel wholesaler and could not therefore have been a participant under the legislation before us as such. It was established on behalf of the Respondent that United Travels, the claimant has no status to make the present claim.

If one looks at the legislation, the Regulations under the Travel Industry Act, specifically at Regulation (15) subparagraph (2) which reads as follows:

Where a participant who is a travel agent has acted in good faith and at arms' length with a participant who is a travel wholesaler and where the participant who is a travel agent has passed his client's money to the participant who is a travel wholesaler and has at his own expense reimbursed his client or arranged alternate travel for travel services contracted for and not provided to the client, effective on and after the 15th day of July, 1975, the participant who is a travel agent shall be entitled to claim for the refund of that portion of the client's moneys passed to the participant who is a travel wholesaler and shall not be entitled to claim any commission received or owing on account of the services contracted for.

It will then be noted that in order for this claim or any similar claim to be heard, what is needed is a relationship between a travel agent and a travel wholesaler, both registered under the Act. On the basis of the evidence that is before the Tribunal such is not the case in this instance. The fact that United Travels became a travel wholesaler much later on is of no avail. The legislation does not operate retroactively.

Secondly, it was further submitted on behalf of the respondent that subparagraph (2a) now subparagraph (3) of the said Regulation 15 was exceedingly relevant. It reads as follows:

Where a participant who is a travel wholesaler has acted in good faith and at arm's length with a participant who is a travel agent and the travel agent has failed to pass his client's money to the travel wholesaler and the travel wholesaler has, at his own expense, reimbursed the client or has provided the travel service contracted for but not paid for by the travel agent to the travel wholesaler, the travel wholesaler shall be entitled to claim for the refund of that portion of the client's moneys received by the travel agent that the travel agent failed to pass to the travel wholesaler, but in no event shall the travel wholesaler be entitled to claim any portion of such moneys that represent commissions.

This again was because the relationship of travel agent and travel wholesaler did not exist at the time relevant to this transaction.

But, by way of answer to that submission the claimant indicated to the Tribunal that proof existed that it, United Travels was acting at the relevant time or times as an agent or "front" for another entity, United Tours Limited, that is to say that United Tours Limited was carrying on business as United Travels and that United Tours was a registered travel wholesaler.

No proof or further evidence of that proposition or suggestion was adduced. The representative of the claimant admitted that he was not in a position to substantiate it.

However, the final and ultimately determining submission made on behalf of the Respondent was to the following effect. In order to succeed, the claimant, even if it could establish that it was in effect an agent or a facit of some other entity such as United Tours Limited carrying on business as United Travels would be bound to rely on the operation of subparagraph (2a) of Regulation 15 - (now subparagraph 3) which begins with the words

Where a participant who is a travel wholesaler has acted in good faith and at arm's length with a participant who is a travel agent and the travel agent has failed to pass his client's money to the travel wholesaler and the travel wholesaler has, at his own expense, reimbursed the client or has provided the travel service contracted for but not paid for by the travel agent to the travel wholesaler, the travel wholesaler shall be entitled to claim for the refund of that portion of the client's moneys received by the travel agent that the travel agent failed to pass to the travel wholesaler, but in no event shall the travel wholesaler be entitled to claim any portion of such moneys that represent commissions.

and in point of fact that subparagraph was not inaccurate by means of an amendment to Ontario Regulation 367/75 made under the Travel Industry Act 1974 under the provisions of Ontario Regulation 805/77. That latter Regulation was made on October 26th, 1977 and filed November 1st, 1977.

Consequently, the Claimant was in the position of relying on a law or Regulation not in existence at the time its claim arose. The said subparagraph was not expressed on its face to be retroactive and it is not. Since the Claimant cannot in any event base its claim on a Regulation or law not in existence at the time the claim arose, this Preliminary Objection in this respect must succeed and on this basis the Tribunal holds that the Claimant has not a valid claim against the Fund and that this claim must therefore be and the same is hereby accordingly disallowed.

TRISTAR TRAVEL AGENCY LTD.

APPEAL FROM PROPOSAL OF THE REGISTRAR UNDER
THE TRAVEL INDUSTRY ACT

TO REVOKE APPLICANT'S REGISTRATION AS A
TRAVEL AGENT

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
ARTHUR GARNER, MEMBER

COUNSEL: ALAN WHITELEY, representing the Applicant
PETER J. WILEY, representing the Respondent

HEARING

DATE: December 6, 1982

REASONS FOR DECISION AND ORDER

The Tribunal was much impressed by the argument of counsel for the applicant and has reached its decision in the light of the very telling points made by him.

We have heard no evidence of dishonesty, nor of moral fault on the part of Mr. Kheir (the applicant company's operator) apart from the exasperating experience to which he has put Mr. Caven. He has also put the Ministry to great expense. He has demonstrated ineptitude. We feel however, that he ought to be given another chance.

The Tribunal Orders that the registration of the applicant be reinstated subject to the following conditions:

1. Audited confirmation of the current financial position as represented in Exhibit 15 by December 27, 1982.
2. Interim statements as required by the Registrar.
3. Records to be kept current and in a form acceptable to the Registrar.
4. Personal guarantee of Mr. Kheir for the liabilities of Tristar Travel Agency Ltd.

5. Personal financial statements as required by the Registrar.
6. Salary and drawings of Mr. Kheir not to exceed the net profit after taxes of Tristar Travel Agency Ltd.
7. Prompt and complete response to requests from the Registrar.
8. No. N.S.F. cheques.
9. Cancel the Gierskup tickets if payment not received in full by December 13, 1982.
10. Provide the necessary Bond or alternative acceptable to the Registrar.

DANIEL UBOGI

APPEAL FROM THE DECISION OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT

TO BE NOT ELIGIBLE FOR PAYMENT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: DANIEL UBOGI, appearing in person

MICHAEL D. LIPTON, Q.C., representing the Respondent

HEARING

DATE: June 9th, 1982

REASONS FOR DECISION AND ORDER

The Applicant claimant has testified that in May 1981, he issued a cheque for \$5,000.00 to one Gil Melo as a downpayment for travel services to be supplied by the said Gil Melo who carried on business as Sunset Travel, it being undisputed that as such he was a participant in the Compensation Fund.

The Applicant had known Melo for some 13 years and had occasion to do business with him in respect of income tax filing, immigration matters and other travel arrangements. Over the years a trust relationship had taken place.

The Applicant testified that the payment was made in anticipation of Melo arranging for a group to travel to Argentina in August 1981 which would enable the Applicant, his wife and three children to travel at reduced cost.

Subsequent to the payment the Applicant telephoned several times regarding the trip but no firm arrangement was concluded. Latterly the Applicant telephoned and when there was no reply he attended the office of the participant. Melo was no longer there and a sign in the window advised that the business was inoperative.

Upon the claimant making a claim upon the Board of Trustees the Board of Trustees determined "that there was insufficient evidence that the sum of \$5,000.00 made payable to a Gil Melo was in fact for travel services to be provided by the Sunset Travel.". The Board found the claim, therefore, not eligible for payment from the Compensation Fund.

There is no additional evidence before the Tribunal except the oral testimony of the Applicant. The Tribunal finds that the Applicant is an unsophisticated consumer of the kind that the legislature must have had in mind at the passing of the statute. There is not the slightest indication that the payment was in respect of any other matter. The Tribunal believes the evidence of the Applicant.

The only other issue raised is the question of the demand requirement under the Act. The Tribunal is of the opinion that the attendance by the claimant upon the premises, constitutes a demand under the circumstances of this particular case to be deemed sufficient to comply with the provision under the Act. The sign in the office indicated it was closed; this at a time when it should be in the process of operating in the ordinary course of business. There is not the slightest indication before the Tribunal that there was any likelihood of success if Melo had been pursued, either that he would or could have been found or that there was any likelihood a formal demand under the circumstances would have led to any success.

Entitlement is subject *inter alia* to the requirement:

"...and after he has made a demand for payment from a participant which the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency..."

Requirement is that the participant has refused to pay (without legal justification) or (that the participant) is unable to pay (by reasons of bankruptcy or insolvency). The requirement in respect of the participant is disjunctive. An affirmative finding in respect of either aspect is in the opinion of the Tribunal sufficient.

The circumstances of the attendance upon the office at a time when the office should have been in operation, the absence of Melo, and the sign in the window, together constitute in the Tribunal's judgment a meeting of that portion of the requirement of the Regulation that there has been a refusal without legal justification to pay by the participant.

The Tribunal has had occasion to hold that all requirements of Section 15(1)(1) of the Regulation are to be met by the claimant and still so holds. However, the degree to which and the formality with which the various requirements must be adhered to are a matter of judgement for the Tribunal.

The Tribunal finds that the Applicant has made payment for travel services and not received them, and that he has made a demand for payment which has been refused without legal justification.

The Tribunal is of the opinion that the legislature though intending that there be obligations on the part of a person dealing with a travel agent to act responsibly did pass protection for the unsophisticated trusting person such as the present Applicant.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to Revised Regulation 938 of the Travel Industry Act, the Tribunal allows the claim and directs the Trustee to pay the same.

AUG 13 1986



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